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v. 4

REPORTS OF CASES
HEARD AND DETERMINED BY
THE LORD CHANCELLOR
AND THE
COURT OF APPEAL IN CHANCERY.

BY
J. P. DE GEX AND H. CADMAN JONES, OF LINCOLN'S INN, ESQS.,
BARRISTERS AT LAW.

EDITED,
WITH NOTES AND REFERENCES TO AMERICAN LAW,
AND SUBSEQUENT ENGLISH DECISIONS,

BY
J. C. PERKINS.

VOL. IV.

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SIR HENRY SINGER KEATING,		
SIR WILLIAM ATHERTON,		

MEMORANDA.

ON the 18th of June, 1859, the Great Seal was, on the resignation of LORD CHELMSFORD, delivered to the Right Honourable JOHN LORD CAMPBELL, Lord Chief Justice of the Court of Queen's Bench.

SIR RICHARD BETHELL and SIR HENRY SINGER KEATING were at the same time appointed Attorney and Solicitor-General on the resignation of SIR FITZROY KELLY and SIR HUGH M'CALMONT CAIRNS.

In the vacation after Michaelmas Term SIR HENRY SINGER KEATING was appointed one of the Judges of the Court of Common Pleas, and WILLIAM ATHERTON, Esq.; one of Her Majesty's Counsel, was appointed Solicitor-General, and shortly afterwards received the honour of knighthood.

In preparing the reports of several of the cases in this and the preceding volume the reporters had the assistance of valuable notes taken by their deeply regretted friend the late Mr. Regnier Moore, whose name and labours they had hoped for the future to have associated with their own.

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REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
HIGH COURT OF CHANCERY.

REPORTS OF CASES
ARGUED AND DETERMINED
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HIGH COURT OF CHANCERY.

GANDEE v. STANSFIELD.

1859. March 2. Before the LORDS JUSTICES.

Assignees in bankruptcy, who were defendants in a suit, had caused the plaintiff to be summoned and examined before the Court of Bankruptcy under the provisions of the Bankrupt Law Consolidation Act on the subject of the suit: *Held*, that they ought not to be ordered to produce, on a summons for production of documents, a copy of the examination.

THIS was an appeal from an order of the Master of the Rolls on a summons for the production of documents.

The defendants were assignees of a bankrupt. The plaintiff alleged by his bill that there had been a partnership between the bankrupt and himself, and the prayer was for a declaration that a moiety of the assets of the late firm belonged to the plaintiff, and that he had a lien on the other moiety under a deed executed by *the bankrupt, and for relief consequential on *2 these declarations.

Before the institution of the suit the assignees had caused the plaintiff to be summoned and examined before the Bankruptcy Court, under the provisions of the Bankrupt Law Consolidation Act, and among the documents, which the defendants by their affidavit on the summons admitted to be in their possession, were office copies of this examination, and of the examination of another person on the same subject, but they objected to produce these copies as being in the nature of minutes of their evidence

in the cause. The chief clerk overruled the objection and ordered the production, and his decision having been confirmed by the Master of the Rolls, who ordered the defendants to pay the costs of the adjournment into Court, the defendants appealed.

Mr. Selwyn and *Mr. Speed*, in support of the appeal.—The documents are privileged as being part of the materials prepared in support of the defence. The application should have been made to the Bankruptcy Court, if at all. The object of the plaintiff is to make his evidence in the cause agree with that given before the commissioner.

They referred to 12 & 13 Vict. c. 113, § 213; *Reynell v. Sprye*, (a) *Llewellyn v. Baddeley*, (b) *Preston v. Carr*. (c)

Mr. Roundell Palmer and *Mr. Beavan*, for the plaintiff.
* 3 * These are not privileged documents. The essence of privilege is a confidential relation, such as that of solicitor and client, between the persons making and receiving the communication. For this reason communications between mere co-defendants are not privileged.

They referred to *Storey v. Lord George Lennox*, (d) *Goodall v. Little*, (e) *Glyn v. Caulfield*, (g) *Lafone v. Falkland Islands*, (h) *Holmes v. Baddeley*, (i) *Betts v. Menzies*, (k)

Mr. Selwyn, in reply.

THE LORD JUSTICE KNIGHT BRUCE.—From the particular nature of the office copies in question I think that neither of them should be produced before the hearing of the cause.

The Lord Justice TURNER concurred.

Order discharged as to the office copies, and as to the costs.

(a) 1 De G., M. & G. 656.

(b) 1 Hare, 527.

(c) 1 Y. & J. 175.

(d) 1 Myl. & Cr. 525.

(e) 1 Sim. N. S. 155.

(g) 3 Mac. & G. 463.

(h) 4 K. & J. 34.

(i) 1 Phil. 476.

(k) 26 Law J. Ch. 528.

* MARRIAGE v. SKIGGS.

* 4

In the Matter of SKIGGS deceased.

1859. March 3. Before the LORDS' JUSTICES.

A bill-holder brought an action against the executors of the drawer, and obtained judgment under the Bills of Exchange Act, before the will was proved by them, they not having applied for leave to defend. Execution was levied, but before any sale (the executors having in the mean time proved the will) a creditor obtained on summons an administration decree: *Held*, that the plaintiff in the administration suit was not entitled to an injunction to restrain further proceedings under the execution.¹

THIS was an appeal from an order of the Master of the Rolls, made on the 8th day of February, 1859, granting an injunction to restrain the London and County Banking Company from recovering, and the Sheriff of Essex from paying, the proceeds of an execution issued at the suit of the bank, upon a judgment obtained against the executors of Robert Skiggs, the testator in the cause.

The testator died on the 4th of October, 1858; his executors acted under his will, but did not prove it until the 21st of January, 1859.

In the mean time the banking company on the 30th of December, 1858, brought the action in question upon four bills of exchange drawn by the testator upon and accepted by his brother Charles Skiggs, and afterwards indorsed to the banking company.

The action was brought under the Bills of Exchange Act (18 & 19 Vict. c. 67), and no application having been made for leave to plead, judgment was obtained on the 15th of January, 1859. A *fi. fa.* issued the same day.

On the 17th of January, the levy took place, and on the 27th of January a part of the testator's property was sold under the execution. The remainder was sold on the 4th of February.

The present suit was instituted by administration *sum- * 5 mons issued on the 27th of January, 1859, the plaintiffs in it being specialty creditors in respect of a mortgage security dated

¹ See Kerr Inj. 110–113; 2 Dan. Ch. Pr. (4th Am. ed.) 1615; Haly v. Barry, L. R. 3 Ch. Ap. 452.

the 21st of July, 1858. Notice of the issue of the summons was given to the sheriff on the 29th of January, 1859.

The administration order was made on the 5th of February, 1859. Notice of motion for an injunction was given on the same day.

The affidavits in support of the motion stated that Charles John Skiggs, a son of the testator, and one of his executors, had resided with his father, and knew of the mortgage security of the plaintiffs in equity; but that his uncle Charles Skiggs, the acceptor of the bills, being anxious that the money due to the bank upon the bills should be paid by the testator or his estate, had had communications with the manager of the Chelmsford branch of the bank upon the subject of the bills; that when the action was brought the executors, although they knew that the plaintiffs were specialty creditors of the testator, took no steps to plead the specialty, but allowed judgment to pass against them, and also forbore to prove the will, so that no other creditor could take proceedings to procure administration of the testator's estate. One of the deponents, in an affidavit filed in support of the motion for an injunction, stated that he verily believed the proof of the will to have been purposely delayed to enable the bank to obtain a judgment and realize the fruits of it.

In opposition to the motion the manager of the Chelmsford branch of the bank deposed that he never had any notice or information from Charles Skiggs or the plaintiffs or any other person whatever of any specialty debt due from the testator * 6 to the plaintiffs until after the * actions were brought, and that he verily believed that no other person or persons on the part of the banking company had any such information or notice.

By the order under appeal an injunction was ordered to be issued restraining the sheriff from further proceeding under the execution, and from paying any part of the moneys levied under such execution to the London and County Bank or their attorneys or agents, and restraining the bank from receiving the moneys levied. And it was ordered that the sheriff should, on or before the 1st of March, 1859, pay into the bank to the credit of the matter and cause, to an account to be intituled "the produce of the execution levied by the sheriff," the amount received by him under such execution after deducting his proper expenses and his costs of the application, and the order was to be without prej-

udice to the right of the London and County Bank to the money so to be paid in.

In giving judgment his Honor said that the motion raised a question which was new to him and one of considerable importance. If a person who was not executor obtained goods of a testator before probate he would be liable to be sued by the creditors of the testator as an executor *de son tort*. Again, if judgment upon a debt of a testator was recovered by default against a person who although appointed executor never acted or proved, and the plaintiff in the action took possession of the goods, such a plaintiff would also be liable for the value of those goods as an executor *de son tort*. The question therefore was, whether the fact of the executor intending to prove and afterwards proving had reference back so as to make all the proceedings good and valid. Upon that point his Honor entertained very considerable doubt. If such were the law, the old principle on which the Court * acted in granting a receiver * 7 *pendente lite* in the Ecclesiastical Court would appear wrong, that principle being that an executor could not sue or be sued before probate was obtained ; and if this Court could not interfere in such a case as the present, an executor might by means of any species of collusion or carelessness allow simple contract creditors to sweep away all the assets to the prejudice of the specialty creditors, it being out of the power of a creditor to obtain a decree in this Court until there was a legal personal representative constituted by the proper Court. His Honor therefore thought that the sheriff ought to pay this money into Court to the credit of the cause without prejudice to the rights which the bank might have in respect of it, which might be determined when they came to prove under the decree.

A motion was now made on behalf of the London and County Bank by way of appeal that the order made at the Rolls should be discharged.

Mr. Roundell Palmer and *Mr. H. Stevens*, in support of the appeal. — This Court could not, according to any principle on which it has acted, interpose after execution. The probate related back to the death of the testator, and rendered valid a judgment against the executor although signed before probate.

They referred to *Giles v. Grover*, (a) *Ranken v. Harwood*, (b) *Vincent v. Godson*, (c) *Williams on Executors*, (d) and the authorities there referred to.

* 8 * *Mr. Selwyn* and *Mr. Nalder*, for the plaintiff in equity. —

This Court has jurisdiction to restrain proceedings at law after a decree for administration, although judgment has been obtained before decree: *Clarke v. Earl of Ormonde*, (e) *Drewry v. Thacker*, (g) *Egan v. Baldwin*, (h) *Kent v. Pickering*, (i) *Burles v. Popplewell*, (k) *Kirby v. Barton*; (l) and such a jurisdiction is imperatively required in a case like the present, for otherwise, by delaying to prove and thus preventing any creditor from obtaining a decree, executors might enable any favoured creditor to obtain a preference without the possibility of control, and in this particular case it is clear that such was the object with which the probate was delayed. The judgment being under the Bills of Exchange Act was signed as a matter of course, no defence being allowed except by leave to be obtained from a Judge. It is, however, very doubtful whether the provision contained in the Bills of Exchange Act applies where the original debtor is not sued, and whether the judgment is not invalid on that ground.

Mr. Southgate, for the executors, and *Mr. Wickens*, for the sheriff, submitted to act as the Court should direct.

Mr. Roundell Palmer, in reply.

THE LORD JUSTICE KNIGHT BRUCE. — The money was in the hands of the sheriff at the instance of the creditor before the decree, and therefore in my opinion the decree does not prejudice the rights of the plaintiff in the action. For that
* 9 the creditor is an * honest creditor is not in dispute. There may possibly be a question whether the executors came within the meaning of the Bills of Exchange Act. I give no

(a) 9 Bing. 128.

(b) 5 Hare, 215.

(c) 24 Law J. N. S. Ch. 121.

(d) Page 1730 (5th ed.).

(e) Jac. 108 & 115.

(g) 3 Swan. 529.

(h) 2 Moll. 532; 1 Hogan, 195.

(i) 5 Sim. 569.

(k) 10 Sim. 383.

(l) 8 Beav. 45.

opinion upon that point, because, whether the executors might have defended themselves on the ground that the case was not within the Bills of Exchange Act, or not, they have not done so, and were, as between them and the general creditors, entitled as I conceive not to take that line of defence.

My opinion is in favour of the execution creditor, and I think that the plaintiff who made the original application should pay the costs at the Rolls and here.¹

THE LORD JUSTICE TURNER. — I am of the same opinion. Lord ELDON, in *Clarke v. Earl of Ormonde*, (a) expressed some surprise that the motion was not made on the part of the executors, and took it to be clear that if after a decree to account the executors suffered judgment to go by default, or permitted the creditors to proceed at law, they would be responsible; he said that if the creditors took property of the testator's in execution the executors would not be able to charge the estate in respect of it, though they might be allowed to stand in the place of those creditors against the estate. This view of the case seems to assume the right of the creditor to take the property in execution, and only raises the question of the right of the executor to charge the estate. There is much the same doctrine to be found in the case before Sir JAMES WIGRAM, which has been referred to, of *Ranken v. Harwood*. (b)

* NICHOLSON v. ROSE.

* 10

1859. March 3. Before the LORDS JUSTICES.

A dwelling-house, with grounds and ornamental water, were demised together, with the control of a plantation (which was on the opposite side of the ornamental water, and belonged to the lessor, but was not demised to the lessee), for the purpose of preventing trespassers thereon, but so as not to interfere with the persons employed by the lessor, his heirs or assigns. The lease referred to a plan on which the plantation was represented.

(a) Jac. 122.

(b) 5 Hare, 215.

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1490.

Held, that on the construction of the lease as explained by the plan, the lessor was not at liberty during the term to destroy the plantation, and an injunction was granted to restrain him from so doing.¹

THIS was an appeal from an order of Vice-Chancellor STUART granting an injunction to restrain the defendant from cutting down a plantation on a portion of his own land, on the ground that he had, as his Honor thought, contracted with the plaintiff, a lessee of another portion of the defendant's land, that the plantation should remain.

By an indenture of lease dated the 16th of March, 1839, a dwelling-house called Cowley Hall, in the parish of Hillingdon, in the county of Middlesex, with the entrance lodge, cottages, gardens, pleasure-grounds, and two pieces of meadow land, ornamental water, fixtures, and other hereditaments, were demised by the defendant to William Burr, from the 29th day of September then last for twenty-one years, at a yearly rent of 80*l*.

By an indenture dated the 14th day of June, 1854, the same premises, together with the lease, were assigned to and became vested for the remainder of the term in the plaintiff.

The property demised comprised a sheet of ornamental water, extending from the entrance lodge in a south-westerly direction, and forming the south-eastern boundary of the premises; and on the other, or south-east side of the ornamental water, was a plantation of larch and ash trees of about five acres in extent, which belonged to the lessor, but was not comprised in the lease. The plantation was of an ornamental character, and stood between the dwelling-house and the road.

* 11 On the 25th of March, 1856, the plaintiff entered * into an agreement in writing with the defendant for a renewal of the lease. No stipulation was inserted in the written agreement as to the plantation not being cut down or destroyed, but the bill stated that an understanding to that effect had been come to, and that it was only on that account that the plaintiff agreed to pay upon the renewal of the lease a much higher rent than that to which he was liable under the then existing lease.

¹ See *Kerr Inj.* 501; *Clarke v. Manchester, Sheffield, & Lincolnshire Railway Co.*, 1 J. & H. 631; *Rankin v. Huskisson*, 4 Sim. 15; *Slee v. Corporation of Bradford*, 4 Giff. 262; *Bennett v. Clemence*, 6 Allen, 10; *Deery v. Cray*, 10 Wallace, 263.

It was also stated to have been understood that the plantation should be kept in order by the defendant, but that the plaintiff should have the control thereof for the purpose of keeping off trespassers, but so as not to interfere with the persons employed by the defendant to keep the plantation in order.

In pursuance of the agreement a renewed lease was made by an indenture of the 9th day of November, 1857, whereby the defendant demised to the plaintiff the messuage or dwelling-house called Cowley Hall, together with the entrance lodge, and the gardener's cottage thereto belonging, and also a certain other cottage adjoining the garden wall, together with the garden and pleasure-grounds, and two pieces of meadow land, containing together about fifteen acres, with the ornamental water; and also the control of the plantation on the opposite side of the water for the purpose of preventing trespassers thereon, but so as not to interfere with the persons employed by the said defendant, his heirs and assigns, to hold under the plaintiff, his executors, administrators, and assigns, from the 29th day of September, 1859, for the term of twenty-one years, at the yearly rent of 130*l*. The premises were referred to in the renewed lease as being more particularly delineated in a plan which was drawn in the margin, and in which the plantation was delineated. And there were covenants for retaining the mansion as a dwelling-house and for quiet enjoyment.

* On the 12th of January, 1859, the plaintiff advertised * 12 the plantation to be cut down and grubbed up, and had, as was stated, expressed his intention to let the site of it for a market garden.

The bill charged that at the time of the plaintiff's execution of the lease of the 9th day of November, 1857, it was the clear and expressed understanding between the plaintiff and the defendant that the plantation should be preserved, and that by the cutting down of the plantation the value and desirability of the dwelling-house as a place of residence would be very much diminished, as its privacy would be materially affected, and that the plaintiff as occupier would sustain irreparable injury. The plaintiff also charged that the defendant was not entitled to cut down the plantation, but that according to the true construction of the lease of the 9th day of November, 1857, he was bound to preserve the same, but that if upon the true construction of the

lease the defendant was not precluded from destroying the plantation the lease ought to be rectified.

The prayer was for an injunction to restrain the defendant from cutting down or otherwise destroying or injuring the plantation, and that if necessary the lease might be rectified.

The Vice-Chancellor granted the injunction, and this was an appeal on behalf of the defendant from the Vice-Chancellor's order. The motion was agreed to be taken as a motion for decree.

Mr. Malins and Mr. Springall Thompson, for the plaintiff. —

* 13 The control of the plantation is parcel of the demise, and the control is demised with a view to the preservation * of the plantation. True the control is demised for a specific purpose, but the demise of the control even for a limited purpose necessarily implies the preservation of the plantation. The renewed lease does not commence till September next. If then the defendant may cut down the plantation the result will be that he will get a higher rent for his property in consequence of having demised a control over that which before the lease commences he will have destroyed. The simple question is, what is the meaning of the lease, bearing in mind that it is the lease of a dwelling-house, and that the plantation is distinctly set out in the plan of the property demised. We submit that the order of the Vice-Chancellor was right.

Mr. Craig and Mr. Eddis, for the defendant the appellant. —

The demise of the control may give a legal right to the plaintiff to prosecute trespassers, and the lease is in fact a demise of a dwelling-house and piece of land, with the right to turn trespassers off another piece of land. The demise of the control is no warranty that the plantation should remain in its then state. The plaintiff would have the same control for the purpose specified; *i.e.*, the keeping off of trespassers, whether the piece of land called the plantation remained planted or not. The maxim *expressio unius exclusio alterius* applies; there is a control demised for the purpose of keeping off trespassers, and therefore no control for the purpose of preserving the plantation. The Court will only aid the legal right. The plan can only be looked at for the purpose for which it is stated to be referred to; *i.e.*, for

showing the limits of the plantation. *North British Railway Company v. Tod*, (a) *Squire v. Campbell*. (b)

* *Mr. Malins*, in reply. — The word “plantation” must * 14 be taken in its ordinary sense. From the position of this plantation and its ornamental character, the trees themselves were valuable. The existence of the plantation as a place planted was clearly of the essence of the contract.

THE LORD JUSTICE KNIGHT BRUCE. — The instrument upon which alone the question turns is so obscure, so strangely expressed, that it is not surprising that controversy has arisen as to its import and effect.

The words are “also the control of plantation on the other side of the water, for the purpose of preventing trespassers thereon.” Their meaning is not to be determined without looking at the plan and instrument, and especially at the covenants for retaining the mansion as a dwelling-house, and for quiet enjoyment. I am of opinion that there is substantially an agreement between the landlord and tenant that what was then a plantation should continue a plantation, and that the order made by the Vice-Chancellor was right. The injunction must be continued, but it is not a case for costs.

THE LORD JUSTICE TURNER. — The question is open to some doubt, but I think to no honest doubt. The case as to the rectification of the lease fails, and the intention of the parties must be gathered from the instrument itself. When the plan is looked at, that intention immediately appears. The cases cited as to the reference to a plan do not apply. If a * valuable * 15 tree were standing in grounds in front of a dwelling-house, and there was a contract with the tenant to protect it, the landlord could not cut it down. I am of opinion that the Vice-Chancellor’s order was right.

(a) 12 Cl. & Fin. 722.

(b) 1 Myl. & Cr. 478.

RIDGWAY *v.* NEWSTEAD.

1859. March 9. Before the LORDS JUSTICES.

An appeal directly from Chambers heard where the Judge had made the order in person, and declined to adjourn the matter into Court to be argued by counsel.

THIS was an appeal directly from a decision of Vice-Chancellor STUART made in Chambers.

Mr. Schomberg appeared in support of the appeal.

Mr. Bacon, for the respondents, took a preliminary objection that the case had not been argued by counsel before the Vice-Chancellor. *Stroughill v. Gulliver. (a)*

The solicitor for the appellant stated to their Lordships that he had been present when the Vice-Chancellor made the order, which was made by him in person, and not by the chief clerk; that he (the solicitor) had requested his Honor to adjourn the matter to be argued by counsel, but that the Vice-Chancellor had declined to do so, stating his opinion to be that it was a case in which the assistance of counsel was not requisite.

Their Lordships upon hearing this statement overruled the objection.

* LINCOLN *v.* WRIGHT.

1859. March 5, 7, 11. Before the LORDS JUSTICES.

A mortgagee, with power of sale, of real estate, informed L., the mortgagor, that he should sell it for 220*l.*, unless more were offered. It was thereupon verbally agreed between L. & W. that W. should buy it on L.'s behalf for 230*l.*, and have a lien on it for that sum; that L. should pay interest, and continue to occupy the part he then occupied, and that W. should receive the rents of the rest to reduce the principal. An offer by W. to purchase for 230*l.* was then sent by L.'s agent to the mortgagee, who accepted it, and under his power of sale conveyed to W.'s infant daughter by W.'s direction. L. continued in occupation of the part he was to occupy, and

(a) *Ante*, vol. 1, p. 113.

paid interest, W. receiving the rents of the rest. This continued for about ten months, when W. died. After his death, the daughter, by her guardian, brought ejectment, claiming to be absolute owner. *Held*, that the Statute of Frauds was no defence to a bill by L. to enforce the agreement.¹

Per the Lord Justice KNIGHT BRUCE. L.'s continuance in possession after the conveyance, being referable only to the verbal agreement, amounted to part performance of that agreement, and excluded the operation of the statute.²

Per the Lord Justice TURNER. Without reference to part performance, the Statute of Frauds was no defence, because W.'s insisting on the conveyance as absolute when it had been agreed that it should be a mortgage, was a fraud, and the Statute of Frauds is not allowed by Courts of Equity to cover fraud.³

THIS was an appeal by the defendants from a decree of Vice-Chancellor KINDERSLEY, giving the plaintiff relief on the footing that a certain instrument, which on the face of it was an absolute conveyance, ought to be treated as in the nature of a mortgage.

In August, 1855, the plaintiff conveyed and assigned all his property to H. B. Gamble upon trusts for the plaintiff's creditors. The plaintiff was entitled to a life-estate in a small property consisting of a house with some land and other buildings, at Congham, partly in his own occupation, and to a policy for 200*l.* on his own life. This life estate and policy along with some other property were subject to a mortgage for 700*l.*, with a power of sale. In September, 1855, the mortgagee offered the

¹ See 1 Sugden V. & P. (8th Am. ed.) 151, 152, and notes and cases cited; Kerr F. & M. (1st Am. ed.) 135.

² See 1 Sugden V. & P. (8th Am. ed.) 150 *et seq.* and notes, 152 and note (*m*¹); 2 Dart V. & P. (4th Eng. ed.) 938; Nunn v. Fabian, L. R. 1 Ch. Ap. 35; Armstrong v. Kattenhorn, 11 Ohio, 265; Pain v. Coombs, 1 De G. & J. 34, 46; Annan v. Merritt, 13 Conn. 478. In order that an act of part performance may have any operation whatsoever, it must be shown plainly what the terms of the agreement are, and it must clearly appear that the act of part performance relied upon is properly referable to an agreement such as the one alleged, and is not referable to another title. Fry Spec. Perf. 174; Kerr F. & M. (1st Am. ed.) 135, 136; Jervis v. Smith, 1 Hoff. Ch. 470; Philips v. Thompson, 1 John. Ch. 131; Lord v. Underdunck, 1 Sandf. Ch. 46; Smith v. Underdunck, 1 Sandf. Ch. 579; Parkhurst v. Van Cortlandt, 1 John. Ch. 274; Byrne v. Romaine, 2 Edw. Ch. 445.

³ See 1 Sugden V. & P. (8th Am. ed.) 150, 151, 174, and cases in note (*z*); 2 Dart V. & P. (4th Eng. ed.) 636; Wood v. Midgley, 5 De G., M. & G. 41 and cases in note.

life estate and policy for sale in one lot, but they were not sold.

On the 7th of October, 1855, the solicitors of the mortgagee wrote to inform Gamble that an offer had been made to purchase the lot at 220*l.*, and that unless he could find them a higher bidder the offer would be accepted.

* 17 * On the 10th of October, 1855, Gamble communicated to the mortgagee an offer from Joseph Wright to purchase the life-estate and policy for 230*l.*, which offer he stated to have been accepted by himself. The mortgagee after some demur adopted the contract, and a written agreement dated 24th of October, 1855, between him and Wright for the sale to the latter at that price was entered into. On the 28th of November, the mortgagee's solicitors wrote to Wright to inform him that the abstract was ready, and, on the 4th December, he instructed them to prepare his conveyance. On the following day he wrote to them desiring that the name of his daughter Elizabeth Josephine might be inserted in the conveyance. The conveyance, which bore date the 31st of January, 1856, was accordingly made between the mortgagee of the one part and Elizabeth Josephine Wright (who was a minor) of the other part, and by it the mortgagee in exercise of his power of sale conveyed and assigned the life-estate and policy to Miss Wright, in consideration of 230*l.* expressed to be paid by her.

The plaintiff's account of the transaction was, that knowing 220*l.* to be much below the value of the property, he asked Joseph Wright, who had expressed a wish to befriend him, to purchase the property on his behalf, and advance the money for that purpose; and that on the 9th of October, it was verbally agreed between Wright and the plaintiff, with Gamble's concurrence, that Wright should purchase the property on the plaintiff's behalf for 230*l.*; that the plaintiff should pay him 5*l.* per cent interest, and pay the premiums on the policy; that the plaintiff should continue to occupy the house and land; and that the rents of the other buildings should be applied in reducing the principal; and that thereupon in order that this contract might be carried out Gamble communicated to the mortgagee an offer by Wright to

* 18 * purchase for 230*l.* The Court considered that this parol agreement was satisfactorily proved.

After the conveyance the plaintiff remained in possession of the house and land without paying rent, Joseph Wright entering into the receipt of the rents of the other buildings. The plaintiff also paid the premiums in the policy as they became due.

Joseph Wright died in November, 1856, leaving a will, by which he devised his real estate to his daughter, and appointed John Beck her guardian, and the sole executor of his will. In April, 1857, Beck, as guardian, served on the plaintiff a notice to quit, which not having been complied with, an action of ejectment was commenced in April, 1858. The plaintiff then filed his bill against Miss Wright, to obtain the benefit of the parol agreement.

The cause came on before Vice-Chancellor KINDERSLEY, on a motion for a decree. His Honor ordered it to stand over to make the executor a party, and upon its coming on again made the usual decree for redemption, except that the account of rents and profits was not on the footing of neglect or default, but extended only to rents and profits received, and Miss Wright's costs up to and including the hearing were not provided for. The defendant appealed.

Mr. Baily and *Mr. W. D. Lewis*, for the plaintiff, in support of the decree. — There is sufficient part performance to take the case out of the Statute of Frauds. *Dale v. Hamilton.* (a)

But * independently of this the Statute of Frauds is no * 19 defence, for the statute cannot be set up to cover fraud.

Childers v. Childers. (b) The case is analogous to the common one of a man purchasing in another's name. The defendant must explain the undisputed facts of the occupation and the payment of the premiums by the plaintiff, which are inconsistent with the defendant's case that this was an absolute purchase.

Mr. Toller and *Mr. Dickinson*, for the defendant. — What we contend for is, that this was an absolute purchase by Mr. Wright for his own benefit, and that he afterwards agreed to let Lincoln continue in possession of part of the property, paying the premiums by way of rent. The possession of Lincoln is consistent with this, and there is no part performance. The case is within the Statute of Frauds, and a writing is necessary. *Bartlett v.*

(a) 5 Hare, 369, 381.

(b) 1 De G. & J. 482.

Pickersgill, (a) *Lord Irnham v. Child*, (b) *Cripps v. Jee*, (c) *Leman v. Whitley*. (d) The purchase was from the mortgagee with Wright's own money, and there is no consideration for a contract by which Wright was to give to Lincoln a right of redemption. The case is very analogous to *Holmes v. Matthews*, (e) in which a similar bill was dismissed.

Mr. Forster, for Wright's executor.

Mr. Baily, in reply.

Judgment reserved.

March 11.

* 20 * THE LORD JUSTICE KNIGHT BRUCE. — The principal or only question of importance in this cause is upon the applicability of the Statute of Frauds, for if that statute is not in the plaintiff's way his title to a decree is, I think, plain enough. But the operation of the statute I conceive to be excluded here by part performance, which I say not without having considered Sir JAMES WIGRAM'S able judgment in *Dale v. Hamilton*, cited in the argument, and other authorities. The leading decisions bearing on the subject are, we know, collected most usefully by Lord ST. LEONARDS in some of his distinguished works, and by Mr. Dart and Mr. Edward Fry in their valuable treatises. I agree that in general where a man holding the actual possession of land, as tenant, under a landlord, enters into a verbal agreement for purchasing the land, the mere circumstance that after the agreement the tenant continues in possession does not amount to part performance. In the present instance, however, though it is true that as well at the time when the plaintiff and the late Mr. Wright entered into the verbal agreement proved by the plaintiff and Mr. Gamble as when the written contract of purchase between Mr. Wright and Mr. Rippingall, dated the 24th of October, 1855, was signed by Mr. Wright, and continually afterwards until his death, the plaintiff was as I collect in the actual and corporeal possession of a substantial portion of the property in dispute, that possession does not appear to have been at any

(a) 1 Ed. 515; 1 Cox, 15.

(d) 4 Russ. 423.

(b) 1 Bro. C. C. 92.

(e) 9 Moo. P. C. C. 413.

(c) 4 Bro. C. C. 472.

time held by him otherwise than in the character of owner, an incumbered owner, it may be, but still owner. And, in the circumstances of the case, I think that the plaintiff's continuance in that possession to the death of Mr. Wright, which happened in the month of November, 1856, amounted to a part performance of the plainly proved verbal agreement between the plaintiff and Mr. * Wright to which the decree has given effect, * 21 and by means of which it was that Mr. Wright, as I view and estimate the evidence, was enabled to acquire an interest in the property. The plaintiff's possession from the time of the vendor's execution of the conveyance to Miss Wright, if not from the time of his written contract that preceded it, was merely wrongful, unless sanctioned by the verbal agreement between the plaintiff and Mr. Wright, to which verbal agreement in my judgment that possession must from one of those periods be referred. I may add, that though I have mentioned part performance alone as a ground for excluding the operation of the Statute of Frauds, I am not sure that its operation is not also otherwise excluded in this case. The price mentioned in the written contract with Mr. Rippingall, and stated in the conveyance to have been paid by Miss Wright (the deed which is dated the 31st of January, 1856, being silent as to any true contract and having only the vendor and Miss Wright as parties), was in truth paid not by the lady, then and now a minor, but by her father, Mr. Wright, who must, I think, be considered as between him and the plaintiff to have advanced it by way of loan to the plaintiff on the security of the purchased property. I am of opinion that there has been an absence of plain dealing, but not on the plaintiff's part; that an unjustifiable attempt to defeat or evade a fair agreement has been unsuccessfully made, and that at least in the main the decree is right. But with deference to the Vice-Chancellor, I conceive that Mr. Beck should pay the plaintiff's as well as the defendants' costs of this suit down to the hearing in the Vice-Chancellor's Court inclusive, and also of the present appeal and the action, which was brought not as by a mortgagee, but on the footing of a denial of the agreement to which the Vice-Chancellor and ourselves have given effect. The conveyance having been made to Miss Wright, as it was, * no costs of it should, * 22 I think, be allowed to the defendants or either of them. But whether something should not be allowed otherwise for the

costs of making the purchase I am not sure. And I have also had some doubt whether the money to be paid by the plaintiff should be paid to Mr. Beck; but if Miss Wright is entitled beneficially to her father's personal estate, the point is probably of little or no importance. The decree, I believe, omits the expression "wilful default." Perhaps in such a case as the present the omission is right; nor, I suppose, does the plaintiff desire to contend that the decree should be in that respect varied. An account is, I observe, directed against Miss Wright as well as Mr. Beck. Perhaps, though the young lady is a minor, this may be correct, but I am not sure of it.

THE LORD JUSTICE TURNER.—Having considered this case since the hearing, I am satisfied that the decree is well founded. Without reference to the question of part performance, on which I do not think it necessary to give any opinion, I think that the parol evidence is admissible, and is decisive upon the case. The principle of the Court is, that the Statute of Frauds was not made to cover fraud. If the real agreement in this case was that as between the plaintiff and Wright the transaction should be a mortgage transaction, it is in the eye of this Court a fraud to insist on the conveyance as being absolute, and parol evidence must be admissible to prove the fraud. Assuming the agreement proved, the principle of the old cases as to mortgages—to which I referred in the course of the argument—seems to me to be directly applicable. Here is an absolute conveyance, when it was agreed there should be a mortgage; and the conveyance is insisted upon in fraud of the agreement. The question then, * 23 as I view it, is * whether there was such an agreement as this bill alleges; and, upon the evidence, I am perfectly satisfied that there was. The conversations, which are proved, referring as they do to the question whether the investment would be safe, and to the payment of the interest and the repayment of the principal, are, to my mind, more satisfactory than if the evidence had been more direct; and I can see no sufficient ground to doubt the testimony of the witnesses. Indeed the evidence on the part of the defendant seems to me to confirm it. If there was no such agreement as the plaintiff alleges, to what are Mr. Beck's and Mr. Wright's offers of 10*l.* a year, as the plaintiff says and it is not denied, to be ascribed? It was said for

the appellant that the plaintiff was to be tenant, paying the premiums upon the insurance; but there is no proof of any such agreement. Again, it was urged on the appellant's behalf, that there was no consideration moving from the plaintiff; but this is a case not of mere trust, but of equitable fraud. Besides, the agreement for the mortgage was only part of an entire transaction, and the appellant cannot, as I conceive, adopt one part of the transaction and repudiate the other. The decree therefore must stand so far as it is against the appellant. The respondent, however, has asked that it may be varied in his favour, by throwing upon the appellant the costs of the action and of the suit to the hearing. The whole of this litigation has arisen from the action, which rendered it necessary to come to this Court for relief; and the relief being due, I think the plaintiff must be indemnified as to the costs. Of course he is entitled to the costs of the appeal.

* LIVERPOOL BOROUGH BANK v. WALKER. * 24

1859. March 23, 24. Before the LORDS JUSTICES.

Executors carried on their testator's trade in that character, and in the ordinary course of the business accepted a bill of exchange, describing themselves in it simply as executors of their testator. *Held*, that neither the above circumstances, nor the form of the acceptance, relieved the estate of one of the executors, who died in the lifetime of the other, from the ordinary equitable liability upon the bill.

THIS was an appeal of two defendants under the 17 & 18 Vict. c. 82, from the decision of the Vice-Chancellor of the Duchy of Lancaster, overruling a demurrer to the plaintiffs' bill, which stated, in substance, as follows:—

That Joseph Wood, late of Radcliffe, in the County Palatine of Lancaster, during his life carried on the business of a cotton-spinner, and by his will, dated the 3d of December, 1849, nominated the defendants Mary Anne Wood and William Wood and Samuel Walker his joint executrix and executors, and directed his executors to continue his business at their discretion so long as they should think it advantageous; but, if not, that they should

then dispose of his stock in trade and invest the same, and pay the interest from such investments as in the will mentioned.

That Joseph Wood died on the 23d of November, 1851; that his will was duly proved by the defendants Mary Anne Wood and William Wood and Samuel Walker, and that his executors and executrix continued his business under the style or name of "The executors of Joseph Wood" till some time in the year 1858.

That in the course of such business two bills of exchange, bearing dates the 30th of July, 1857, and the 23d of October, 1857, for the respective sums of 980*l.* and 1450*l.*, and both payable at three months after date, and expressed to be for value

received, were, in the usual course of such business, accepted as follows: "Accepted *payable at Messrs. Glyn & Co.'s, London. P. pro. The Executors of Joseph Wood, William Wood," and were discounted and indorsed to the plaintiffs; and that both of the bills were dishonoured.

That an action was commenced by the plaintiffs upon these two bills of exchange against the defendants Mary Anne Wood and William Wood and Samuel Walker; but that Samuel Walker died before final judgment in the action.

That final judgment was duly signed on the 18th of May, 1858, against the defendants Mary Anne Wood and William Wood for 2478*l.* 13*s.* 6*d.* and 7*l.* 17*s.* 2*d.* taxed costs, and that execution issued, but that the fruits of such execution amounted to the sum of 1655*l.* 3*s.* 6*d.* only, leaving a balance of 849*l.* 14*s.* due, with interest from the 12th of July, 1848.

That Samuel Walker died on the 30th of April, 1858, having appointed the appellants his executrix and executors, all of whom duly proved his will, and that the entire estate of Joseph Wood had been exhausted, and that the defendants Mary Anne Wood and William Wood were utterly and entirely insolvent.

The prayer was, that the appellants, as executrix and executors of the testator Samuel Walker, might admit assets of the said testator come to their hands sufficient to pay the plaintiffs the balance of 849*l.* 14*s.*, and interest thereon at the rate of 5*l.* per cent per annum, and the costs of the suit, and that they might pay the same accordingly by a short day to be named, or that an account might be taken of what was due to the plaintiffs in respect of the two bills of exchange, with interest and costs,

and of all other the debts which were owing by Samuel Walker * at the time of his death and which still remained * 26 unpaid; that the usual accounts of the personal estate of Samuel Walker might be taken under the direction of the Court, and that his personal estate might be applied in a due course of administration; that for the purposes aforesaid all necessary accounts might be taken and inquiries made.

To this bill the defendants demurred generally.

The Vice-Chancellor overruled the demurrer, saying that whatever doubt might be thrown upon the original soundness of the rule in equity, the authorities were far too conclusive, of too ancient date, too high and too well settled to admit of any doubt that, if the survivors of several joint debtors are unable to discharge the debt, the creditor has a right to proceed against the estate of the deceased debtor.¹ That it had been, however, endeavoured, very ingeniously, to distinguish the present from the ordinary case by a reference to the peculiar character in which this trade was carried on, and to the notice which was given to all parties dealing with the executors that they were carrying on business as executors on behalf and for the profit of the estate; and to the fact of their having announced to all the world in the negotiable instruments which they accepted that they were accepting them simply in their character of executors, and therefore giving notice that they were acting on behalf and for the benefit of the estate. The Vice-Chancellor, however, thought it impossible to establish that distinction upon any sound principle. If executors or assignees in bankruptcy, or assignees under a deed of composition, or assignees under any other trust deed, choose to carry on a business of any kind they must (the Vice-Chancellor thought) be held to carry on that business as between themselves and the world at large in the ordinary character * of mercantile traders, and their * 27 contracts must have all the character of ordinary mercantile contracts, imposing upon them jointly and severally all the same liabilities as if they were carrying on business on their own account and for their own profit. Indeed if this principle were

¹ See Collyer Partn. (5th Am. ed.) §§ 576-583, 580 note (3), and cases cited; 1 Story Eq. Jur. § 676; Story Partn. § 362; Burnside v. Merrick, 4 Met. 544; 3 Kent, 63, 64; Camp v. Grant, 21 Conn. 41; Fillyan v. Laverty, 3 Florida, 72; Bennett v. Woolfolk, 15 Geo. 213; Parsons Partn. (1st ed.) 448.

not acted upon it would lead parties into endless litigation and involve Courts of Equity in a great number of intricate and endless inquiries. For example, if these executors had been also residuary legatees, it would hardly have been contended that a distinction in that case could be successfully established between the business carried on by them and a business carried on by other persons. The Vice-Chancellor said that it had been ingeniously but fallaciously argued that no profit had been derived by the executors from the business, but that the question was, whether they derived any profit, not from the business as a whole, but from the particular transaction in dispute. And it appeared to the Vice-Chancellor that they derived precisely the same profit from this transaction as ordinary traders. Whatever money or goods they might have received in exchange for the bills in question remained in their hands as assets and under their sole control for the purpose of repaying to themselves any advances which they might have made on account of the estate, or for the purposes of discharging their existing liabilities, to which, it was conceded, that as long as they all lived they were all liable. And the principle upon which Lord HARDWICKE proceeded in *Bishop v. Church*, (a) to which Sir WILLIAM GRANT referred in *Sleech's Case*, and which had been subsequently acted upon in other cases, applied to executors and trustees carrying on business in partnership and incurring liabilities of this kind, which the Court there considered joint and several. The demurrer must, therefore, be overruled.

Against this decision the defendants appealed.

* 28 **Mr. Teed* and *Mr. E. R. Turner*, in support of the demurrer.

—In *Ex parte Kendall* (b) Lord ELDON, after expressing his surprise that a Court of Equity should have interposed to enlarge the effect of a legal contract, and should have held a mere joint creditor entitled to resort to the assets of a deceased debtor, added, “That is, however, only an equitable right, and to be met, therefore, by equitable circumstances.” And again his Lordship said, “It must still be recollected that this is a demand in equity only, and to be enforced only upon equitable principles.” Such principles do not in the present case apply so as to render *Mr. Walker's* executors liable. Here the parties trading

(a) 2 Ves. Sen. 100 & 371.

(b) 17 Ves. 514.

were doing so in a representative capacity, of which the creditors had notice by the terms of the instruments under which they claimed. It has been decided that the liability of an acceptor may be limited by the form of the acceptance. *Lindus v. Melrose*. (a) As the defendants could not go into the question of consideration for the bill as against the plaintiffs, so neither could the plaintiffs as against the defendants. It is not clear how the principle on which the claim of the creditor in cases of this kind is said to be founded, viz., the working out of the equities between the joint contractors themselves, affords a foundation for making the estate of one deceased contractor bear the whole debt. Such a claim has no place in the common law: Co. Litt. 182 a; nor in the civil law: Bowyer's Commentaries, p. 187. *Wilkinson v. Henderson*, (b) which was cited below, only decided that an insolvent partner need not be sued. *Thorpe v. Jackson*, (c) also cited below, is inconsistent with *Jones v. Beach*. (d) * Moreover, the effect of the * 29 judgment entered up against the executrix and surviving executor merged the original debt, and exonerated the deceased executor. *Ex parte Christy*, (e) *King v. Hoare*, (g) *Ex parte Higgins*. (h)

They also referred to and commented upon *Green v. Beesley*, (i) *Heath v. Sansom*, (k) *Turner v. Hardey*, (l) *Aspinall v. Wake*, (m) *Ashby v. Ashby*, (n) *Rawstone v. Parr*, (o) *Sumner v. Powell*, (p) *Ex parte Richardson*, (q) *Cutbush v. Cutbush*, (r) *Eastwood v. Bain*, (s) and relied in particular on *Wilmer v. Currey*. (t)

Mr. Giffard and *Mr. Little*, for the plaintiffs, were not called upon.

THE LORD JUSTICE TURNER. — I think that this demurrer was properly overruled. The bill expressly states that the defendants

(a) 3 H. & N. 177.

(b) 1 Myl. & K. 582.

(c) 2 Y. & C. Exch. 553.

(d) 2 De G., M. & G. 886.

(e) 2 Dea. & C. 155.

(g) 13 M. & W. 494.

(h) 3 De G. & J. 33.

(i) 2 Bing. N. C. 108.

(k) 4 B. & Ad. 172.

(l) 9 M. & W. 770.

(m) 10 Bing. 51.

(n) 7 B. & C. 444.

(o) 8 Russ. 424, 539.

(p) 2 Meriv. 30.

(q) 3 Madd. 138.

(r) 1 Beav. 184.

(s) 8 H. & N. 738.

(t) 2 De G. & Sm. 347.

carried on business under the style or name of "The executors of Joseph Wood," and it states that the bills of exchange in question were accepted in the usual course of business. I think that, upon the allegations of this bill, the executors must be liable in the same manner as if they carried on trade under any other name. The appeal must be dismissed, but the costs may be costs in the cause.

The Lord Justice KNIGHT BRUCE concurred.

1859. March 25. Before the LORDS JUSTICES.

An absolute gift in clear language in a will is not taken away unless by language equally clear.¹ Where, therefore, a testator having made a provision in his will for his eldest grandson by a bequest of leasehold property, directed that his residuary real and personal estate should be equally divided between his four other grandchildren in common, and declared that the share of each should remain vested in the trustees of the will upon trust to permit him and her to receive the income for life, and after the decease of each, his or her share to be in trust for his or her children: provided, that if the share of any one or more of the four grandchildren should not vest in any children or child of his or her body, or in case the term in the leasehold given to the eldest grandson should expire in his lifetime, then and in either of such cases the eldest grandson should be let into and take an equal share in the residuary estate intended for the other four grandchildren and their issue equally with such other grandchildren or their respective issue. *Held*, that on the death of one of the four younger grandchildren without issue, the residue remained divided into four, and was not redistributable into five parts.

THIS was an appeal from the decision of the Master of the Rolls on the construction of the will of Thomas Oldfield, dated the 15th of June, 1824, whereby, after giving life interests (which had determined) to the widow, to his son Robert Oldfield, and to Mary Oldfield (his daughter-in-law), he directed his trustees

¹ See *Randfield v. Randfield*, 2 De G. & J. 57, and note (2); *Hearle v. Hicks*, 1 Cl. & Fin. (Am. ed.) 20, and cases in note (1); *In re Arrowsmith's Trusts*, 2 De G., F. & J. 474.

(subject to certain dispositions in favour of his daughter-in-law, which were to cease on his grandson Thomas Albion Oldfield attaining the age of twenty-six years) to stand possessed of a leasehold house, with eight acres or thereabouts of land adjoining, with buildings, situate at Great Bowling Alley Fields, Islington, to be held in trust for his grandson Thomas Albion Oldfield (if he should attain the age of twenty-six years) for so many years of the testator's term and estate therein as Thomas Albion Oldfield should happen to live; and in case of his death within the term, then in trust for such child or children of his body as should live to attain the age of twenty-one years, equally to be divided amongst them if more than one, their executors, administrators, and assigns, as tenants in common, but not as joint tenants; * but if Thomas Albion Oldfield should die under * 31 the age of twenty-six years, or, having attained that age, should die without leaving any child or children who should attain the age of twenty-one years, then and in either of those cases the premises, after his decease and such failure of his issue, were to be held in trust for each and every other of his said five grandchildren in succession, according to their respective seniorities, for their lives, and for their respective children who should attain the age of twenty-one years, in like manner as the said premises were thereinbefore given to Thomas Albion Oldfield and his children; and the trusts in favour of each elder grandchild and his or her issue were to take effect before the trusts in favour of each younger grandchild, and his or her issue. But if no one of his said five grandchildren should attain the age of twenty-six years, or if they should all die without any of them leaving a child or children who should attain the age of twenty-one years, then the testator directed that the said leasehold premises should be in trust for the executors or administrators of his grandson Thomas Albion Oldfield. The testator then directed his residuary personal estate to be got in and invested, and that such investments, and all his freehold and copyhold estates (subject to preliminary charges, all now expired), and his leasehold estate (subject to the preceding bequests and charges), should be held by his trustees upon trust to lay out and invest the income in the funds or on real securities, and from time to time to receive and reinvest the interest, dividends, and yearly proceeds

of the moneys so invested, and go on from time to time increasing the said fund by accumulation in the way of compound interest until the expiration of the term of twenty-one years, to be computed from the day of the testator's decease, or until the youngest of his said five grandchildren Thomas Albion Oldfield,

* 32 Robert Oldfield, Alfred Oldfield, Mary Ann * Oldfield, and Edward Oldfield who should live to attain the age of twenty-one years should have attained that age, which should first happen: And as to his said freehold, copyhold, and leasehold estates, moneys, stocks, funds, securities, and premises, the rents and profits, interest and income whereof were thereinbefore directed to be accumulated, and also as to all the moneys, stocks, funds, and securities to be raised and produced by such accumulation as aforesaid, he declared that the same should be equally divided between his four grandchildren Robert Oldfield, Alfred Oldfield, Mary Ann Oldfield, and Edward Oldfield as tenants in common, subject to the provisos thereafter contained: Provided always, that the share of the said four grandchildren should remain vested in the trustees, their heirs, executors, administrators, and assigns respectively, in trust to permit him or her to receive the rents, interest, or other income thereof, during his or her life; and as to the share of Mary Ann Oldfield, the same to be paid into her own hands for her separate use: And from and after the decease of each of the said four grandchildren, the testator directed that his or her share of the trust estates, moneys, securities, or premises should be in trust for all and every his or her child or children, equally to be divided amongst them if more than one, share and share alike, to be an interest vested in males at the age of twenty-one years, and in females at that age or on their respective marriages under that age, with benefit of survivorship as to the shares of such children as should die without acquiring vested interests therein, and with power to apply the income of the said portions respectively for the maintenance and education of any child or children presumptively entitled thereto during his, her, or their minority or respective minorities. And the will contained the following proviso, upon the construction of which the question directly arose:

* 33 "Provided also, *and I do further declare my will to be, that in case it shall happen that the share or shares

of any one or more of my said four grandchildren shall not become vested in any child or children of his, her, or their body or bodies, as above expressed, or in case my lease or term of and in the aforesaid messuage in my own occupation, and the out-buildings and land adjoining the same hereinbefore settled upon my said daughter-in-law Mary Oldfield and her eldest child, shall happen to expire or run out during the life of my said grandson Thomas Albion Oldfield, then and in either of the said cases the said Thomas Albion Oldfield shall be let into and take an equal share of and in the aforesaid trust estate, moneys, securities, and premises hereby intended for and settled upon my other four grandchildren and their issue as aforesaid, equally with such other grandchildren or their respective issue; nevertheless my will is that any share to which he, the said Thomas Albion Oldfield, shall by the trusts aforesaid become entitled of and in the said trust estates, moneys, securities, and premises shall become liable to the same trusts for the benefit of himself and his children, and with the like provisos and limitations over as hereinbefore declared and expressed concerning the shares of my said other grandchildren."

Of the four younger grandchildren Edward died before he attained twenty-one, Robert attained twenty-six and died in 1846 without issue, and Mary Ann died unmarried in 1852. Alfred lived to be twenty-six years of age and died in 1839, leaving a daughter named Mary Ann, who married Henry Kiver, and she and her husband were the plaintiffs. Thomas Albion Oldfield, who was the testator's heir-at-law, died in January, 1857, leaving a widow (the defendant Harriett Oldfield) and a son (Thomas Oldfield the younger, and * who was a defendant, * 34 but who had not attained the age of twenty-one years), and having made a will, giving all his property upon trust for his widow for her life, and after her death in trust for the person or persons who under the will of the original testator Thomas Oldfield would upon the decease of this testator, Thomas Albion Oldfield the grandson, become entitled to the property given by Thomas Oldfield's will.

By the order under appeal, it was declared that, according to the true construction of the will of Thomas Oldfield, all the testator's freehold, copyhold, and leasehold estates and premises, and

personal estate (if any), the rents, profits, and interests whereof were thereby directed to be accumulated, became upon the death of the testator's grandson, Edward Oldfield, without having had a child, subject to a redistribution and thenceforth became and were divisible into five equal parts or shares, and that the testator's grandson, Thomas Albion Oldfield, became entitled to one of such equal fifth parts or shares, subject, nevertheless, to the like trusts for the benefit of himself for life, and after his death for his children, as by the testator's will were declared concerning the shares of his the testator's four other grandchildren in favour of their children, and in default of such children, upon trust for Thomas Albion Oldfield (the grandson) absolutely. And as to one other of such equal fifth parts or shares (being the share of Edward Oldfield deceased), the same, upon his death without having had any child, descended and vested as the freehold estates upon and in Thomas Albion Oldfield (the grandson), as his eldest brother and heir-at-law; as to the copyhold estate upon the customary heirs of Edward Oldfield. And that as to the leasehold premises and the personal estate (if any) the same passed to the legal personal representatives of

* 35 Edward Oldfield, as part of his personal estate. And * that as to one other of such equal fifth parts or shares (being the share of the testator's grandson, Robert Oldfield), the same upon his death without having had any child, and intestate, descended and vested as to the freehold estate upon and in Thomas Albion Oldfield (the grandson) as his eldest brother and heir-at-law, and as to the copyhold estate upon the customary heir of Robert Oldfield, and that as to the leasehold premises and the personal estate (if any), the same passed to the legal representative of Robert Oldfield, as part of his personal estate; and that as to one other of such equal fifth parts or shares (being the share of the testator's grandson Alfred Oldfield), the same descended and vested in Jane Mary Ann Kiver, and her husband Henry Kiver in her right, as the only child of Alfred Oldfield who lived to attain the age of twenty-one years. And that as to the remaining over of such equal fifth parts or shares (being the share of the testator's granddaughter Mary Ann Oldfield), the same upon her death without having had any child descended and vested, as to the freehold estate, upon and in Thomas Albion Oldfield as her eldest

brother and heir-at-law ; and as to the copyhold estate upon her customary heirs ; and as to the leasehold premises and the personal estate (if any) passed to her legal personal representative as part of her personal estate.

Mr. Lloyd and *Mr. G. L. Russell*, for the plaintiffs, in support of the appeal. — The plaintiffs are entitled to a moiety of the property. The proviso, though imperfectly framed, is nothing more than an accruer clause. The Master of the Rolls has not regarded the words, “the share or shares of any one or more,” and has construed the proviso as if it had been confined to the death of one of the four grandchildren only, whereas, according to the true construction, it was intended to operate *toties quoties*. The object of the proviso * was merely to substi- * 36 tute for any brother or sister who died leaving a child, Thomas Albion Oldfield, equally with the other grandchildren. At all events, the plaintiffs are entitled to one-fourth, and not merely to one-fifth. One-fourth is clearly given to them, and cannot be taken away by any words less clear. It is true, that in the event of the lease having expired in the lifetime of all five grandchildren, the proviso might have given Thomas Albion Oldfield an equal share with his brothers and sister. But that event has not happened, and the proviso may be read as two clauses, — one providing for the event of the expiration of the leasehold in the lifetime of Thomas Albion Oldfield, and the other for the event of a grandchild dying without issue.

Mr. Roundell Palmer and *Mr. Marten*, for the defendants Harriett Oldfield and Thomas Albion Oldfield the younger. — The construction put on the clause by the Master of the Rolls is according to the literal meaning of the words, against which there is nothing stronger than conjecture to be urged. The proviso does not divest the share of a grandchild, except so far as is necessary to let in the eldest grandson, but to that extent it is expressly divested, nor is there any pretence for construing the clause as one of repeated accruer. The one person who is to take under it is clearly Thomas Albion Oldfield and no one else ; the purport of the clause being to let him in only. What he is to take is equally clear : it is an equal share with the other grandchildren or their issue.

Mr. Lovell, for the other parties.

Mr. G. L. Russell, in reply.

THE LORD JUSTICE KNIGHT BRUCE. — This will, although
 * 37 singularly penned, clearly gives a * fourth part of the property in question to the plaintiffs, or one of them, and this share cannot be taken from them except by language equally clear. The construction to be gathered from every portion of the will taken together appears to me to be that in the event of the death of one of the four grandchildren without leaving a child, the share of another of the four was not intended to be diminished. That is the event which has now happened, and I think that there is nothing in the will to convert upon that event the plaintiffs' one-fourth share into a fifth.

THE LORD JUSTICE TURNER. — It is not to be wondered at if different minds should arrive at different conclusions upon the meaning of such language as this. I think the plaintiffs entitled to one-fourth, and not merely to one-fifth. There are two events provided for. If the lease had run out in the lifetime of Thomas Albion Oldfield, and there had been no death of any of the other four without issue, he would have taken a fifth with them. But the clause ought, I think, to be construed distributively. If a grandchild died without issue Thomas Albion Oldfield would take a fourth. Equally does not mean an equal division, but that he shall come in in the same manner as the other children.

The decree was varied by declaring that according to the true construction of the will the property in question became, upon the death of Edward Oldfield without having had a child, divisible into four equal parts between the testator's grandsons,
 * 38 Thomas Albion Oldfield, * Alfred Oldfield, and Robert Oldfield, and his granddaughter Mary Ann Oldfield; and that the testator's grandson, Thomas Albion Oldfield, became entitled to one of such equal fourth parts or shares, subject nevertheless to the like trusts for the benefit of himself for life, and, after his death, for his children, as by the will were declared concerning the shares of the testator's four other grandchildren in favour of their children, and in default of any such children, upon trust

for Thomas Albion Oldfield (the grandson) absolutely. The remainder of the decree was in the same terms as that of the Master of the Rolls above set out, except that the words "equal fourth parts" were substituted for "equal fifth parts."

EARL OF MANSFIELD v. OGLE.

1859. March 25, 26. Before the LORDS JUSTICES.

P. carried in a claim as an incumbrancer upon real estate in respect of an annuity, and in November, 1855, the chief clerk certified 1002*l.* to be due to him for arrears. The cause did not come on for further consideration till July, 1858. P. then claimed interest on the 1002*l.* from the date of the certificate as against subsequent incumbrancers.

Held, that as the payment of the arrears had been delayed merely through hindrances in the prosecution of the suit, and not in consequence of misconduct or improper attempts to evade payment, interest ought not to be allowed, and that the Statute 3 & 4 Will. 4, c. 42, § 28, did not alter the case.¹

Held, also, that the chief clerk's certificate, though adopted by the Judge, was not an order for payment of money within 1 & 2 Vict. c. 110, § 18, so as to make the sum found due carry interest.²

THIS was an appeal from an order of the Vice-Chancellor STUART dismissing a petition for payment of interest on the sum found by the chief clerk to be due to the petitioner for arrears of an annuity.

The petitioner John Pearce, one of the defendants, carried in a claim before the Master under the decree in * this * 39 cause, claiming to rank as an incumbrancer in respect of an annuity charged on the estates to which the suit related. The Master disallowed the claim, but on the 14th of February, 1855, exceptions to the report were allowed by Vice-Chancellor STUART, who made an order directing that an account should be taken of what was due to the petitioner in respect of his annuity, and that the place in which the petitioner stood in relation to the other incumbrancers should be stated.

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1255, 1256; *Blogg v. Johnson*, L. R. 2 Ch. Ap. 228.

² See 2 Dan. Ch. Pr. (4th Am. ed.) 1035, 1036.

By certificate filed on the 19th of November, 1855, the chief clerk of Vice-Chancellor STUART certified that there was due to the petitioner for arrears of his annuity 1002*l.* 7*s.* 1*d.*, that the value of the annuity was 500*l.*, and that it was the second incumbrance, that of the plaintiff being the first.

The cause did not come on for further consideration till the 22d of July, 1858, and in order to prevent its being thrown over the long vacation, an arrangement was come to that the order should direct payment to the petitioner of the 1002*l.* 7*s.* 1*d.* and the 500*l.*, with interest on the 500*l.* from the 9th of August, 1855, and that the question whether the petitioner was entitled to interest on the 1002*l.* 7*s.* 1*d.* should be treated as left open. The petitioner accordingly on the 15th of January, 1859, presented his petition for payment of such interest from the 9th of August, 1855, out of the fund in Court, arising from the sale of the estates on which the annuity was charged. The application was opposed by Henry Wheeler, the next incumbrancer on the estate, and was refused with costs by the Vice-Chancellor, who held that there was nothing in the case to take it out of the ordinary rule, that interest is not to be given on the arrears of an annuity.

* 40 * *Mr. Lee* and *Mr. Fooks*, for the appellant, referred to *Hyde v. Price*, (a) 2 Wms. Saund., (b) *Gaunt v. Taylor*, (c) 3 & 4 Will. 4, c. 42, § 28; 1 & 2 Vict. c. 110, § 18.

Mr. Wickens, for Wheeler, the next incumbrancer, supported the order of the Vice-Chancellor. He referred to *Booth v. Leicester*, (d) *Re Powell's Trusts*, (e) and *Jenkins v. Briant*. (g)

Mr. Lee, in reply, referred to *De Haviland v. Bowerbank*, (h) *M'Clure v. Dunkin*, (i) *Batten v. Earnley*, (k) *Tew v. Winter-ton*. (l)

THE LORD JUSTICE KNIGHT BRUCE. — I abstain from saying what I should have thought of the present claim for interest if it

(a) 8 Sim. 578.

(b) Page 107, n.

(c) 3 Myl. & K. 302.

(d) 3 Myl. & Cr. 459.

(e) 10 Hare, 134.

(g) 16 Sim. 272.

(h) 1 Campb. 50.

(i) 1 East, 436.

(k) 2 P. Wms. 163.

(l) 1 Ves. Jr. 451.

had been made against the general assets of Mr. Ogle the grantor, who covenanted for payment of the annuity. The claim is not so made; it is made against the property specifically charged with the annuity, and therefore substantially against the subsequent incumbrancers, the benefit of whose securities must so far be taken away from them if the present application should succeed. In my judgment the application was rightly refused by the Vice-Chancellor, and the appeal must be dismissed with costs.

THE LORD JUSTICE TURNER. — This is an appeal from an order of Vice-Chancellor STUART dismissing a petition for payment of interest on the * arrears of an annuity found by the * 41 chief clerk's certificate to be due. There is no question as to interest on the arrears of the annuity as they accrued due. The question is, as to interest on the aggregate sum found by the chief clerk to be due in respect of such arrears. In the absence of special circumstances such an application as the present appears to me to be against all the rules of the Court. The question was much discussed in *Creuze v. Hunter*, (a) where the Lord Chancellor considered the subject in all its bearings. It may be said, however, that this is not the only case on the point, and that the Court is now more disposed to allow interest than it then was. But in the case of *Martyn v. Blake*, (b) decided by a most eminent Judge in Ireland, so lately as the year 1842, the principles on which the Court proceeds as to giving interest on arrears are laid down in terms which are thus summed up in the marginal note: "The established rule of this Court (which, however, is only general and not inflexible) is that interest cannot be recovered upon the arrears of an annuity, but interest will be given upon the arrears of an annuity where the person bound to pay it has been a party to the deed by which it was created, and his acts disclose a system of gross misconduct and opposition to the Court for the purpose of evading payment. Mere legal delay is not a sufficient ground to induce the Court to give interest, nor will a mere covenant to pay an annuity be sufficient to create an exception to the general rule. But if there is a covenant to indemnify an annuitant against the effect of incumbrances, and

(a) 2 Ves. Jr. 157.

(b) 3 Dru. & War. 125.

the perception of the annuity has been prevented by the claims of incumbrancers, and especially if this has occurred in consequence of the acts of the covenantor, a case for damages

* 42 under the covenant is clearly shown, and this Court, in * order to prevent circuitry of action, obtains jurisdiction to give interest upon the arrears of the annuity." This case clearly and expressly lays down what I take to be the rule of the Court. It is contended, however, that this rule has been altered by the recent course of legislation, and two statutes were referred to in support of this view, namely, 3 & 4 Will. 4, c. 42, and 1 & 2 Vict. c. 110. The question as to the effect of the former statute was considered by me when Vice-Chancellor in the case of *Powell's Trusts*. (a) I do not rely on my own decision in that case as an authority, but I do rely on *Booth v. Leycester*, (b) and *Martyn v. Blake*, both of which cases were subsequent to the statute, as decisive upon the question. The latter case also disposes of the argument founded on 1 & 2 Vict. c. 110. Independently of that case it appears to me quite plain that the chief clerk's certificate is not an order for payment of money within the meaning of the 18th section of 1 & 2 Vict. c. 110. I am of opinion, therefore, that neither of the statutes referred to has any bearing on this case, nor can I find in it any special circumstances to take it out of the general rule. There has been nothing to stop payment of the arrears but ordinary legal delay in carrying on the proceedings in the suit, and that is not a sufficient ground for allowing interest. To allow interest in a case like the present would be a dangerous precedent; if interest is to be allowed here why should it not be allowed on the arrears of interest on a mortgage debt? The payments of an annuity must be considered as consisting partly of principal and partly of interest, and so far as they consist of interest, I do not see any difference between them and the arrears of interest on a mortgage debt; so that we are, in fact, asked in this case to

* 43 order * payment of interest on the arrears of interest found due by the certificate. I am of opinion that the Vice-Chancellor has come to a right conclusion, and that the appeal ought to be dismissed with costs.

(a) 10 Hare, 184.

(b) 3 Myl. & Cr. 459.

CROUCH v. WALLER.

1859. March 26. Before the LORDS JUSTICES.

Leave given to a married woman to prosecute an appeal *in formâ pauperis* without a next friend.¹

THIS was an application by the plaintiff, a married woman, for leave to present and prosecute an appeal from a decree of the Master of the Rolls, and any other further proceedings in the cause, *in formâ pauperis*, and without a next friend.

The bill had been filed for the purpose of establishing the right of the plaintiff to an annuity of 60*l.* settled to her separate use by her husband, who was one of the defendants. The Master of the Rolls held the deed granting the annuity to be void, and dismissed the bill.

The plaintiff, by affidavit in support of the application, deposed that the next friend positively declined to allow his name to be used any longer in the proceedings, except for the purpose of the present application; that the plaintiff had no friend or acquaintance who would consent to allow his or her name to be substituted for that of the present next friend in the further prosecution of the suit; that the plaintiff was at present subsisting entirely on parochial aid, and was not worth 5*l.* in the world, her wearing apparel and the subject-matter of the suit excepted.

Mr. Cole appeared in support of the application.

Their Lordships made the order asked.

* In the Matter of the Petition of Right of PETER ROLT. * 44

1859. April 15. Before the Lord Chancellor, Lord CHELMSFORD.

Leave given to a petitioner who had presented a petition of right to file a bill against the Attorney-General, notwithstanding the issuing of a commission under the petition of right.

THIS was a motion on behalf of Peter Rolt, one of the assignees under the bankruptcy of Charles John Mare, a contractor, for

¹ See 1 Dan. Ch. Pr. (4th Am. ed.) 38, 39, 40, 111.

leave to file a bill in chancery against the Attorney-General, or to take such other proceedings as to the Court should seem meet for bringing the question arising on a petition of right, which the applicant had presented, within the equitable jurisdiction of the Court; and that a commission issued under the petition of right, and the inquisition thereon might be dealt with by the Court as should be deemed necessary for the purposes of the suit.

The petition of right stated in effect that the bankrupt had in the months of May and July, 1855, entered into contracts with the admiralty to build certain gun-boats and despatch vessels at the prices in the several contracts mentioned. That the adjudication of bankruptcy was made in September, 1855, and that on the 11th of October, 1855, the solicitor to the admiralty wrote to the official assignee requesting to be informed whether the assignees intended to complete the contracts. That a few days after the receipt of that letter the petitioner and the official assignee had an interview with the surveyor-general to the navy, at which it was agreed that the assignees should complete the vessels within the times limited in the contract, on being indemnified from loss, and on the actual cost and expenditure for labour and materials to be thereafter incurred by the
 * 45 assignees in * the completion of the vessels being repaid to them every fortnight.

The petition of right was presented in August, 1858, and was referred to the Court of Chancery to be dealt with, and thereupon an application was made to the Lord Chancellor for a commission to inquire into the truth of the statements in the petition, on which the Lord Chancellor and the Lords Justices took a similar course to that adopted in *Carl Von Frantzius's Case*. (a)

The commissioners had several meetings and examined witnesses on behalf of the petitioner, and the inquisition thereon was prepared in draft, and was about to be returned when it was suggested that the petitioner's case appeared to be one which could be more properly dealt with if brought within the equitable jurisdiction of the Court; and the present application was made with that view, the question being whether the petitioner was by proceeding under the commission precluded from asking leave to file a bill.

It was stated in support of the application, that a letter which

(a) 2 De G. & J. 126.

was relied upon by the government as constituting the contract did not contain the true terms of it, and that the applicant desired an opportunity of proving what had taken place at the interview with the surveyor to the navy.

Mr. Rolt and *Mr. F. Waller*, in support of the application.

The Solicitor-General (Sir H. CAIRNS) and *Mr. Wickens*, for the Attorney-General, consented.

The following authorities were referred to: *Clayton v. * The Attorney-General*, (a) *Monckton v. The Attorney-General*, (b) *Viscount Canterbury's Case*. (c) * 46

The Lord Chancellor said that, as there were two precedents in point, and the Attorney-General consented, an order might be made that the petitioner should be at liberty to file his bill against the Attorney-General notwithstanding the petition of right.

In re THE NATIONAL PATENT STEAM FUEL COMPANY.

BARTON'S CASE.

1859. April 16, 18. Before the LORDS JUSTICES.

B. agreed to accept shares in a joint-stock company. Scrip certificates were given to him, but he never executed the deed of settlement, nor received certificates of shares. Before the 26th of October, 1853, B. sold his scrip without giving notice to the company. On the 26th of October, 1853, the directors circulated among the shareholders an advertisement, that the shares of all persons who did not execute the deed before the 21st of November next would be forfeited. On the 4th of May 1854, a meeting of shareholders passed a resolution that the shares of the persons who should not have executed the deed before the 31st of May should be absolutely forfeited; and in June, 1854, a circular was issued by the directors to the shareholders, in which the shares were treated as forfeited. The deed of settlement contained no provisions authorizing such forfeiture. Neither

(a) 1 C. P. Coop. 97.

(b) 2 Mac. & G. 402.

(c) 1 Phil. 306.

B., nor the transferees from him, ever executed the deed, or claimed to be shareholders. In March, 1858, an order was made for winding up the company.

Held, that B.'s name must be on the list of contributories.¹

THIS was a motion by way of appeal from an order of Vice-Chancellor KINDERSLEY fixing the name of Mr. Vincent James Barton on the list of contributories of the National Patent Steam Fuel Company.

This company was a joint-stock company, formed in the year 1852, under 7 & 8 Vict. c. 110, and was completely registered on the 21st of September in that year. * The capital was to consist of 50,000*l.* divided into 50,000 shares of 1*l.* each.

On the 26th of June, 1852, Mr. Barton wrote to the provisional directors as follows:—

“The Directors of the National Patent Steam Fuel Company.

“Gentlemen, — I request you will allot me 100 shares in the above company, and I hereby undertake to accept the same or any less number that may be allotted to me, and pay the sum of 1*l.* per share when required.

“Your obedient servant,

“V. J. BARTON.”

On the 8th of July, a letter allotting to Mr. Barton 100 shares was sent to him. On the 17th of July, he paid the sum of 1*l.* per share, and on the 17th of August, 1852, he received scrip certificates for 100 shares.

The deed of settlement of the company was dated the 17th of September, 1852. The only clause relating to the forfeiture of shares was the 67th, which was as follows:—

“That in case any transferee of any share or shares, whether taking the same in his own right or becoming entitled in any of the representative capacities aforesaid, or as the nominee of any party so entitled, shall for the space of three calendar months

¹ See *In re Vale of Neath, Ex parte Morgan*, 1 Mac. & G. 225, note (1), and cases cited; *Lindley Partn.* (Eng. ed. 1860) 516, 617, 621; 2 *ib.* 1089, 1113, 1135; *Spackman v. Evans*, L. R. 3 H. L. 171; *Eustace v. Dublin Trunk Connecting Railway Co.*, L. R. 6 Eq. 182; *Knight's Case*, L. R. 2 Ch. Ap. 321.

after the transfer thereof neglect to execute these presents or some deed of covenant referring thereto or some duplicate thereof pursuant to the notice to that effect to be printed on the back of every certificate and of every copy of the form of transfer hereinbefore mentioned, as provided by the 53d clause of these presents, or in case any person claiming on the *ground of any evidence required to be left under the *48 60th clause of these presents, shall for the space of six calendar months after the event on which his or her title depends neglect or be unable to procure and leave valid and sufficient evidence as required by the same clause, or if from any cause whatever no such evidence shall be left within the time last aforesaid by the party legally entitled to leave the same, then and in every such case the share or shares of or claimed by any such person making such default or so unclaimed as aforesaid shall be immediately and irredeemably forfeited to the use of the company."

Mr. Barton never executed the deed nor exchanged his scrip certificates for certificates of shares. Previously to the 26th of October, 1853, he sold his scrip certificates in the market without giving any notice thereof to the company or effecting (a) any transfer thereof, and none of these scrip certificates were ever returned to the company, nor were any shares issued in respect of them.

On the 26th of October, 1853, a meeting of directors was held, at which it was resolved that the following notice should be published in two newspapers, and a copy sent by post to each shareholder:—

"National Patent Steam Fuel Company.

"Notice is hereby given, that those shareholders who have not yet signed the deed of settlement of the company in respect of such shares held by them are required to execute the same on or before Monday the 21st day of November next, or in default the shares will be absolutely forfeited."

It was admitted that this notice was circulated among the shareholders.

(a) This is the expression used in the written admission agreed to by the parties.

* 49 * At a special meeting of the shareholders held on the 4th of May, 1854, a report of the directors was read, in which it was stated that as to the shares proposed to be forfeited the directors would rather that such a step should spring at once from the meeting than from a recommendation by themselves, but that at the same time they must express their opinion that such a measure would be one of common fairness to the shareholders who had executed the deed. The following resolution was then passed, — “ that the whole of the shares for which the deed of settlement of the company will not have been signed on or before the 31st of May instant be thereafter absolutely forfeited.”

In pursuance of a resolution passed at a meeting of directors held on the 10th of June, 1854, a circular was printed and circulated among the shareholders, which contained the following passage : —

“ About 2000 shares on which 1*l.* per share has been paid have been forfeited in conformity with resolutions passed at general and extraordinary meetings of the shareholders, and to this extent the company has been benefited. In order to meet instalments due to the contractors and falling due shortly, the directors recommend the reissue of the forfeited shares bearing interest from profits of six per cent per annum.”

Various shares were reissued in pursuance of the intention expressed in the above circular, and such reissue was confirmed at a meeting held on the 25th of January, 1855, but none of the shares originally allotted to Mr. Barton were thus reissued.

It did not appear that Mr. Barton ever attended any meeting or ever took any part in the concerns of the * company, * 50 except as mentioned above, nor had he, or any transferee from him, ever, after October, 1853, claimed any interest in the company in respect of the shares allotted to him.

In March, 1858, an order was made for winding up the company, and on the 21st of March, 1859, Vice-Chancellor KINDERSLEY, on a summons adjourned from Chambers, decided that Mr. Barton's name ought to be on the list of contributories.

Mr. Baily and *Mr. Waley*, for the appellant. — We do not

dispute the decision in *Cookney's Case*, (a) in which it was held that an agreement to take shares is a sufficient ground for placing a person on the list of contributories. A person who has entered into such an agreement, which is free from objection and has never been abandoned, could not resist specific performance, he is therefore rightly treated as a shareholder. The question here is, whether when the contract has been declared by the company to be at an end, and has for years been treated as being so, the person who entered into it can be treated as being liable. The company took the law into their own hands, and declared the shares forfeited; the proceeding was no doubt irregular, but it has for years been acquiesced in by everybody concerned, and discharges the appellant. *Beresford's Case*. (b) The Vice-Chancellor held that as there was no power to forfeit shares the acts of the directors in this respect were void. But there are many cases in which effect has been given to an act not coming within the precise terms of the deed, and a distinction is to be taken between a shareholder and a person who has only entered into an *executory agreement to take shares. * 51 *Beresford's Case*. (c) In *Cookney's Case* no act had been done to release the contributory, here there has been a declaration of forfeiture acquiesced in for years. The 67th clause it is true relates only to forfeiture of shares, not of scrip, but it is only reasonable to consider that the directors were intended to have like powers as to scrip. It is unreasonable and unjust that the company should declare shares forfeited, and then years afterwards claim contribution from the holder. The Vice-Chancellor decided against this argument only on the technical ground in *Morgan's Case*. (d) If the present decision is right, Mr. Barton was subject to an inalienable personal liability to take these shares himself, a most inconvenient doctrine, and this shows that there must of necessity be some latitude in dealing with executory contracts to take shares. In such contracts all the equities applicable to specific performance are let in. If the personal concurrence of every shareholder is requisite to make the forfeiture valid, there is sufficient evidence to warrant the conclusion that there was such concurrence. Barton could not under the circumstances of this case have claimed to be a share-

(a) *Supra*, vol. 3, p. 170.

(b) 3 De G. & Sm. 175.

(c) 2 Mac. & G. 197, 200.

(d) 1 Mac. & G. 225.

holder, so neither can the company claim to make him one; there must be mutuality. *Goldsmid's Case*, (a) *Prendergast v. Turton*. (b)

Mr. Glasse and *Mr. Baggallay*, for the official manager. — Before the 26th of October, 1853, Barton sold his scrip, therefore acquiescence by him is nothing, and it is not proved in any way that his transferees did acquiesce in the forfeiture. He gave no notice of the sale, and so did not put any one into his

* 52 place. *Woodfall's Case*, even if * sound, was essentially different from the present, but it is hard to reconcile it with *Morgan's Case*. You must look to the original contract to determine the rights of the parties; there is no power of forfeiture which is applicable, and the forfeiture therefore was *ultra vires*: the directors had no authority to release Barton from his contract with the company. In *Beresford's Case* there was a power of forfeiture, and the Vice-Chancellor rightly relied on that as distinguishing that case from the present. There is no power to forfeit shares unless it be given by the deed of settlement. *Clarke v. Hart*. (c) It is no argument against us that the decision involves the conclusion that an allottee cannot get rid of his contract to take shares. We submit that he cannot. As to the application of the principles relating to specific performance, they, if applicable, would not help the appellant, for there would be specific performance in a case like the present. *New Brunswick and Canada Railway and Land Company v. Muggeridge*. (d)

Mr. Baily, in reply. — The transferees from Barton gave no notice to the company, and so left him to represent them; they are therefore bound by acquiescence, and could not now claim to be shareholders. In *Beresford's Case* there was no clause of forfeiture which was applicable, but there were circumstances which would have prevented specific performance, and the case is therefore in substance the same as the present. Here there is as strong evidence of the consent of the shareholders as can be had in such a case, and after a lapse of four years the company could never have compelled Barton to take the shares.

(a) 16 Beav. 262.

(c) 6 H. L. Cas. 633.

(b) 1 Y. & C. C. C. 98.

(d) 7 W. R. 369.

THE LORD JUSTICE KNIGHT BRUCE. — It appears to me that the declaration of forfeiture in * this case was without author- * 53
ity and ineffectual: still, if on the part of Mr. Barton or the owner or owners of the scrip certificates which originally belonged to him there had been accession or submission to the forfeiture, that circumstance might have made a difference in his favour. The evidence does not appear to me to show that there was any such accession or submission. The rights of Mr. Barton and the present owner or owners of his scrip remain, and therefore I fear that their liabilities also remain. The case appears a hard one, and perhaps not a perfectly clear one. In my judgment, Mr. Barton ought not to be ordered to pay the costs of the appeal. The official manager will take his costs out of the estate.

THE LORD JUSTICE TURNER. — I also agree with the Vice-Chancellor in the conclusion at which he has arrived. It rests upon Mr. Barton to show that he is discharged from the liability which he incurred by taking the scrip. It is urged on his behalf that he is so discharged because the circumstances are such that a Court of Equity would not decree against him specific performance of his contract to take the shares; but the case does not seem to me to depend upon the principles of the Court as to decreeing specific performance. It depends, I think, upon the principles which apply to the acts of directors with reference to their standing in the position of trustees.¹ The powers of directors to bind the company cannot be extended by any considerations applicable to cases of specific performance. The power of the directors cannot be more extensive merely because the contract to take shares is executory; and that being so, the forfeiture was not duly declared, for it is admitted that the directors had no * power to declare it. There being then no valid * 54
declaration of forfeiture, the question can only be whether there was a valid contract to absolve Mr. Barton from liability to the company. The directors had no power so to absolve him, and I think that, as in *Morgan's Case*, the consent of all the

¹ See *Shrewsbury and Birmingham Railway Co. v. London and North-western Railway Co.*, 4 De G., M. & G. 115, note (1), and cases cited; S. C., 6 H. L. Cas. 113; *Bennett's Case*, 5 De G., M. & G. 284; S. C., 18 Beav. 339; 1 Lindley Partn. (Eng. ed. 1860) 493, 494.

shareholders to their doing so cannot be inferred. The circumstances, indeed, would incline us to draw such an inference ; but I am not disposed to give way to the inclination, as I foresee the vast amount of uncertainty and litigation that would arise if a new principle were to be applied to this class of cases. As the case, however, is one of some novelty and hardship, I agree with my learned brother that Mr. Barton ought not to be ordered to pay the costs of the appeal.

* 55 * ATTORNEY-GENERAL *v.* CHAMBERS.

ATTORNEY-GENERAL *v.* REES.

1859. January 28, 29, 31. April 20. Before the Lord Chancellor Lord CHELMSFORD.

An information for the purpose of having the title of the Crown to alluvium gained from the sea declared and established is analogous to a bill to ascertain boundaries, and requires in support of it admissions or evidence showing a title in the Crown to some lands in the possession of the defendant. But where the witnesses in support of the information deposed that the alluvium had been added to the main land, not gradually and imperceptibly, but rapidly: *Held*, that a sufficient case had been made for directing issues. Turning of cattle upon alluvium by the proprietor of land not separated from it by any boundary, although without interruption, held not an assertion of right so acquiesced in as to raise a presumption of title.¹

Semble, that the title to alluvium arising from artificial causes does not differ as to the rights of land-owners from the title to alluvium arising from natural causes, where the artificial causes arise from a fair use of the land adjoining the sea-shore, and not from acts done with a view to the acquisition of the sea-shore.²

¹ Cutting grass nearly every year on flats covered part of the time by the tide does not amount to disseisin. *Commonwealth v. Roxbury*, 9 Gray, 451.

² Where the water is diverted, by artificial means, and not imperceptibly, from the land of a proprietor bounded by low-water mark, he acquires no title to the derelict bed of the stream. *Halsey v. McCormick*, 18 N. Y. 147. But in this case, PRATT J. said, "I find no distinction in the books between the case of alluvium formed by natural or artificial means." And so in *Adams v. Frothingham*, 3 Mass. 352, it was held that additions made to the shore by alluvium, from a union of natural and artificial causes, belong to the owners of the shore. See *Angell Tide Waters* (2d ed.), 251, 252.

THESE cases, which are reported in De Gex, Macnaghten, and Gordon's Reports, (a) now came on for further consideration. The facts, so far as they were ascertained, and the points which arose on further consideration, appear sufficiently from the judgment.

The Solicitor-General (Sir HUGH CAIRNS), *Mr. W. M. James*, and *Mr. Hanson* were for the Crown.

They referred to *Smart v. Magistrates of Dundee*, (b) *Todd v. Dunlop*, (c) *Attorney-General to Prince of Wales v. St Aubyn*, (d) *Attorney-General v. Chamberlaine*, (e) *Rex v. Lord Yarborough*, (g) *Scrutton v. Brown*, (h) *Lord Advocate v. Hamilton*, (i) *Hale, De Jure Maris*. (k)

Mr. Roundell Palmer and *Mr. Giffard*, for the defendant Lewis.

* They referred to *Re Hull and Selby Railway Com-* * 56
pany, (l) and commented on the authorities already referred to.

Mr. Raach and *Mr. Dickinson*, for other defendants.

The *Solicitor-General* replied.

Judgment reserved.

April 20.

THE LORD CHANCELLOR. — These cases come on to be heard before me on further directions, and arise upon informations filed

(a) Vol. 4, page 206.

(e) 4 K. & J. 292.

(b) 8 Bro. P. C. (Tomlin's ed.) 119.

(g) 3 B. & C. 91.

(c) 2 Robinson's App. Ca. 333.

(h) 4 B. & C. 485.

(d) Wightwick, 167.

(i) 1 Macq. 46.

(k) Hargrave's Law Tracts, pp. 14, 15, 20, 28, 35. [As to the authenticity of the treatise, entitled *De Jure Maris*, ascribed to Lord HALE, see Phear Rights of Water, 47, note (2); Angell Watercourses (6th ed.), § 54, note (2); Mereweather on the Sea-shore, p. 11; *Calmady v. Rowe*, 6 Man., G. & Scott, 878 note (c).]

(l) 5 M. & W. 327.

by the Attorney-General for the purpose of asserting and establishing the rights of the Crown upon the sea-shore in the parishes of Llanelly and Pembrey, in the county of Carmarthen. The informations originally included several defendants, but their cases have all been disposed of, and the defendants David Lewis and John Hughes Rees are the only parties who are now resisting the claims of the Crown.

The defendant Lewis is a party to both the informations, as the owner of lands in both the parishes of Llanelly and Pembrey. The defendant Rees is a party only to the information which relates to the parish of Pembrey. The prayer of each information is the same *mutatis mutandis*,—"That the right of her Majesty to the sea-shore, below high-water mark, may be established and declared, and that any leases or licenses to embank or build upon, or to dig or raise coal or culm from the sea-shore, may be declared null and void; that the boundary or mark to which the sea flowed at high water, at ordinary high tides, upon

the shore before certain embankments and buildings were
 * 57 erected thereon, and also * those portions of the works or mines from which coal or culm is gotten, which lie under the land of her Majesty, may be ascertained and distinguished; and that, if necessary, a commission may issue for the purpose of ascertaining and distinguishing the same."

Of the defendants, to whom I have generally referred, Lord Cawdor opposed the claim of the Crown on the ground that he was lord of the manor of Kidwelly, and as such that he, and not the Crown, was the owner of the sea-shore within the manor.

Another defendant, Mr. Chambers, claimed to have become the owner of the sea-shore adjoining his lands, by the exercise of long-continued acts of ownership.

The defences, therefore, of Lord Cawdor and of Mr. Chambers met the whole case of the Crown, and, if they could have been established, would have terminated the dispute so far as the Crown was concerned. Accordingly, on the cause coming on to be heard before the Master of the Rolls, his Honor, on the 21st of January, 1852, directed certain issues to be tried between the Crown and Lord Cawdor and between the Crown and Mr. Chambers, to determine the questions which had been raised between them respectively. Before the issues with Mr. Cham-

bers came on to be tried he abandoned his opposition and consented to take a lease of the sea-shore from the Crown.

The order of the Master of the Rolls was thereupon amended, and the issues directed were confined to those between the Crown and Lord Cawdor. Upon these issues coming on to be tried, Lord Cawdor submitted, upon certain conditions, to a verdict being entered for the Crown. Thus, as to these defendants, the right of the Crown to * the sea-shore, within the parishes * 58 of Llanelly and Pembrey, was established.

The question then arose, what was the true boundary of the sea-shore; the defendants Lewis and Rees contending that the utmost limit of the Crown's right was the line of high-water mark of ordinary neap tides.

For the purpose of determining this question it was arranged, as to the defendant Lewis, that the cause should be set down on further directions, and, by consent of the Lord Chancellor, should be heard by him, in the first instance, assisted by two common-law Judges.

The question was accordingly argued before the Lord Chancellor (Lord CRANWORTH), Baron ALDERSON, and Mr. Justice MAULE, and on the 15th of July, 1854, they pronounced their judgment: "That the landward boundary of the sea-shore or *littus maris* around England and Wales is the medium line of the high water of all tides occurring in the ordinary course of nature throughout the year." (a)

Having thus obtained a definition of the boundary of the rights of the Crown on the sea-shore, the next thing to be done was to ascertain and lay down the line so defined in such parts of the sea-shore as were adjacent to the lands of the defendants Lewis and Rees, and by consent it was, by order of the 22d of January, 1855, referred to the late Mr. Rendel, an engineer¹ of eminence, to make a plan "of so much and such parts of the shores of the rivers Bury and Lougher, in the information mentioned, as is or are adjacent to the several lands in the possession of the defendants David Lewis and John * Hughes Rees, or their * 59 respective lessees in the information mentioned, and to as-

(a) 4 De G., M. & G. 206 [(Am. ed.) note (2), and the cases and authorities cited; Commonwealth v. Roxbury, 9 Gray, 482, 483, and 520, in note by Mr. (now Judge) GRAY; Phear Rights of Water, 41, 42].

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 983.

certain and lay down upon such plans the present medium line of high water, as hereinbefore defined; and the said James Meadows Rendel is to be at liberty, if he should think fit, but not otherwise, to report the grounds on which he has proceeded, or to report any matters specially to this Court; and it is ordered that such plans, when signed by the said James Meadows Rendel, be deposited with the clerk of the records and writs in whose division these causes are, with liberty for all parties to inspect the same as they shall be advised, at all reasonable times, giving reasonable notice thereof; and it is ordered that such plans, when so signed and deposited as aforesaid, be, subject to any order of the Court, binding and conclusive upon the Crown and upon the defendants now appearing as to the present medium of high water; but the said reference and plans are to be without prejudice to such right and claim, if any, of the Crown to such land, if any, as was formerly below but is now above the medium line of high water of all tides throughout the year, and without prejudice to any other question in the cause."

This order was afterwards varied, so far as the defendant Lewis was concerned, by limiting it to such parts of the shore as are adjacent to certain specified lands belonging to him in the parish of Llanelly.

Mr. Rendel died in November, 1856, without having completed or reported upon the matters referred to him, whereupon, on petition of the Attorney-General, by an order of the Lord Chancellor of the 1st of May, 1857, Mr. George Parker Bidder, the civil engineer, was appointed to act, in the place of Mr. Rendel, in making the plans and ascertaining and laying down the medium

line of high water directed to be made and ascertained and
 *60 *laid down, Mr. Bidder being at liberty to adopt any plans already made by Mr. Rendel.

Mr. Bidder made his report, 3d of July, 1858, in which he states as follows: "I have ascertained and laid down upon the plan, hereto annexed, so much of the shores of the river Bury and Lougher, in the pleadings in these causes mentioned, as is or are adjacent to the land in the pleadings in these causes mentioned of the defendant David Lewis or his lessees, in the parish of Llanelly, in the county of Carmarthen (that is to say)." Then he mentions the different farms, and says, "I have ascertained and laid down upon the same plan the present medium line of

high water upon those parts of those shores of all tides occurring in the ordinary course of nature throughout the year.” Then he makes a special report, and he says, “I report specially to the Court that, in my judgment, the natural line of high water between the points marked K. and Z. on the said plan has been more or less varied by the direct or indirect operation of artificial causes; and I particularly call attention to the fact that the present medium line of high water, as laid down upon the said plan hereto annexed, does not, in my judgment, represent, at the points marked on the said plan with the letter A., the medium line as existing previous to the construction of the South Wales Railway; and further, that at the bank of sand, marked C. on the said plan, the natural medium line of high water has heretofore been and still continues affected by the gradual accretion of that sand bank by the indirect operation of artificial causes; and further, that the medium line of high water has been varied and still is continually affected by the direct operation of artificial causes at the points in the harbour of Llanelly marked with the letter B. on the said plan.”

Upon this report of Mr. Bidder the Crown now claims * to * 61 have the line of medium high tide ascertained and laid down as it ought to have existed, and as it would have existed at the time of filing the information, but for the artificial causes to which he refers. This proposed limitation of the inquiry to the period of the filing of the information will exclude the consideration of the effects produced by the South Wales Railway mentioned in Mr. Bidder's report, which was not in existence at the time when the information was filed.

The claim now made, on the part of the Crown, involves a question of novelty and of some difficulty, which may be stated, in general terms, to be, whether the well-known rule of law as to the right of land gained from the sea is applicable to a case where the alluvium or dereliction has not been the result of merely natural causes?

This question seems to me raised with sufficient certainty by the informations and the answers. I will take the allegations in the information which relates to Mr. Lewis's lands in Llanelly.

It states thus: “Certain pieces of land” (which are mentioned) “abut on the sea-shore of the Bury river, and about thirty years ago there were erected, without any license or con-

sent of her Majesty's predecessors, partly upon that piece of land which is called Penrose Taur Farm, and partly on the sea-shore in front thereof, lying within the harbour of Llanelly, extensive buildings and works, in and at which there has been and is now carried on the business of copper-smelting by the former and present members of a copartnership, in whose occupation the buildings and works now are, who carry on the business under the name of Sims & Co., which said firm or copartnership consists of the following members" (it mentions their names), "all of whom are defendants." "Subse-

* 62 quently to the erection of the copper-works, the * firm of Sims & Co., without the license and consent of her Majesty or of her Majesty's predecessors, raised, or caused to be raised, on the sea-shore in front of the said pieces of land called respectively Penrose Vach Farm, Penros Faur Farm, the Morvadhu and Bryn Farm, very extensive embankments, formed principally with the slag and rubbish produced by their copper-works; and upon the said embankment the said Messrs. Sims & Co. have constructed a wharf, coal-yards, a large chimney-stack, store-houses and other buildings connected with their copper-works; and also a considerable extent of railway adjoining and leading to the dock formed in and by the said embankment of slag and rubbish, that the said embankment of slag and rubbish, by reason of its being carried out a considerable way into the harbour of Llanelly and its impeding the former line and scour of the tides, has caused a considerable silting up the parts of the harbour which lie adjacent to it on either side; and portions of the shore of the said Bury river adjoining the land, which was formerly covered by the sea at ordinary high tides, have, in consequence thereof, become either permanently dry land or only covered at extraordinary high tides." It then charges, "that the embankment formed by Sims & Co., by throwing out slag and rubbish, are encroachments upon, and nuisances in, the port of Llanelly; and that, owing to the said slag embankment projecting far into the port, and the other encroachments on the sea-shore, by and under the pretended title or authority of the defendants respectively, the sea has been prevented flowing and reflowing over many parts of the shore over which it had, antecedently to such encroachments, flowed and reflowed from time immemorial, and should have continued to flow and reflow if such encroachments

had not been made.” Then it charges that such portions of alluvial land, so formed by or gained from the sea, have not been added to the * adjoining main land by the gradual * 63 and imperceptible projection of soil or silt upon the shore, arising from the operation of natural causes, but that the same had been produced by the works and artificial embankments raised by, and by leave and license of, the defendants respectively; and charges that all such additions to the main land as have been produced by or caused by illegal erections of embankments or other purprestures upon the sea-shore belonging to her Majesty do not belong to the owner of the adjacent lands, but belong to her Majesty.

The defendant Lewis, by his answer, submits that the right of the Crown does not extend beyond high-water mark of ordinary neap tides, “and does not extend to or embrace any alluvium, the same being of gradual formation, whether the same shall have been produced by natural or unknown causes, or by cuttings or embankments lawfully made, or other lawful artificial means.” Then he says, that he denies that such portions of the land so formed on the sea-shore, as in the information is mentioned, if any such land there be, have not been added to the adjoining main land by natural alluvion. And he says that he denies that the same, if any such there be, had been produced by the works and artificial embankments raised by, and by license from, the defendant or other defendants respectively, or any of them; but whether the same lands, if any such there be, have or have not been produced by such works and artificial embankments, yet inasmuch as such works and embankments were lawfully made, and, as to all or some of them, under the authority of an Act of Parliament, defendant submits that the same do not belong to her Majesty, but to the owners of the adjoining land. Then he further says that he cannot answer as to his belief or otherwise whether the other defendants do or do not allege, that said pieces of land, as formed upon the said sea-shore, as * in * 64 the said amended information mentioned, if any such there be, have been added to the adjoining land by a gradual or imperceptible projection or subsidence of soil or silt, and that the same were produced by natural causes; and that although such pieces of land have been produced by the operation of artificial causes, or by embankments, or by cutting channels, yet the same belong

to the defendants, the owners of the adjoining lands, and that such portions of alluvial land so formed by, or gained from, the sea, have been added to the adjoining main land by the gradual and imperceptible projection of soil or silt upon the sea-shore arising from the operation of natural causes, and that the same have not been produced by the works and artificial embankments by, or by leave or license of, the defendants.

I think, therefore, that the information and the answer, taken together, raise the issue as to the right of the Crown to alluvium produced by artificial causes.

The fact of the line of high water having materially varied upon parts of the shore adjoining to some part of the defendants' lands is, I think, clearly proved by several witnesses, and may be assumed, upon the report of Mr. BIDDER, to have been the result of the operation of artificial causes. These causes appear to have been partly the copper-works of Sims & Co., which were erected in 1804 and 1805, and the buildings which were subsequently added, but principally the embankment formed by throwing slag and rubbish on the sea-shore by Messrs. Sims & Co., by which the main land (as it is stated) has been raised or has silted up, and considerable portions of what was formerly sea-shore have been added to the main land.

* 65 This embankment appears to have extended as far as * some of the lands of the defendant Lewis, viz., to Penrose Farm, as stated by the witnesses Dankin and Garrett, and to Bryn Farm, as shown by David Griffith, and to have indirectly affected the line of high water upon the shore adjoining other lands belonging to him.

The embankment I collect from the evidence to have been the ordinary spoil bank always produced by the regular and accustomed operations of copper-works.

It will be necessary, before I consider the rights of the Crown upon the facts just stated, to clear the case of all that relates to Stanley Marsh. The defendant Lewis claims the sea-shore in front of this part of his property upon the ground of uninterrupted enjoyment for sixty years.

During the course of the argument I intimated a strong opinion that the acts of ownership upon which the defendant relies were quite insufficient to prove actual possession. They consisted merely of turning out upon the Marsh the cattle of the

defendant, which crossed the invisible line of boundary separating the Marsh from the sea-shore, and the cattle being allowed thus to stray without interruption. But the effect of acts of ownership must depend partly upon the acts themselves and partly upon the nature of the property upon which they are exercised. If cattle are turned upon enclosed pasture ground and placed there to feed from time to time, it is strong evidence that it is done under an assertion of right; but where the property is of such a nature that it cannot be easily protected against intrusion, and if it could it would not be worth the trouble of preventing it, there, mere user is not sufficient to establish a right, but it must be founded upon some proof of knowledge and acquiescence by the party interested in resisting it, or by perseverance in the * assertion and exercise * 66 of the right claimed in the face of opposition.

The defendant's rights in the sea-shore, opposite Stanley Marsh, will not, therefore, be different from those which he is entitled to in respect of his other lands, and the claim of the Crown to all accretions produced by artificial causes may be considered with reference to all the defendant's lands without distinction. There is very little authority to guide us upon the question, which, as far as I can discover, is now raised for the first time. None of the cases cited in the course of the argument throw much light upon it. Indeed, with the exception of the cases of *Rex v. Lord Yarborough*, of the *Hull and Selby Railway Company*, and, perhaps, of *Scratton v. Brown*, there is not one which bears at all upon the point of slow and insensible accretions on the sea-shore, whether naturally or artificially produced.

In *Smart v. The Magistrates and Town Council of Dundee*, (a) which was the case of a grant of premises on the sea-shore, described as bounded on the south by the sea-flood, it was held that the grantee had no right to follow the sea, or to have the land acquired from it or left by it where it had receded; but the claim of the grantee was not to follow the sea, which had receded slowly and insensibly, but he insisted that his property, being described as bounded on the south by the sea-flood, he was entitled, both by the special terms of the grant and by the common law, to take in ground from the sea, by embankments

(a) 8 Bro. P. C. 119.

and other operations of the same kind, opposite to his property.

The case of *Todd v. Dunlop*, (a) which was decided * 67 * upon the authority of *Smart v. Magistrates of Dundee*, was, as far as can be collected from the short statement of the facts, not a case of gradual and imperceptible accretion, but of sudden acquisition of additional land by the operations of the trustees of the river Clyde. It therefore differed from the case of *Scrutton v. Brown*, (b) where the advance of the sea had been gradual and imperceptible, and the high and low water-mark had varied in the same degree, and where it was held that the freehold of the grantee of the shores and sea-grounds shifted as the sea receded or encroached.

There is nothing, however, in any of the cases, or in the few text writers upon the subject, which hints at the distinction now sought by the Crown to be established between effects produced by natural and by artificial causes. In order to determine whether there is any ground for this distinction, it is essential to discover, if possible, the principle upon which the right to *maritima crementa* depends.

The law is stated very succinctly by Blackstone (c) in these words: "As to lands gained from the sea, either by alluvion, by the washing up of sand and earth, so as in time to make *terra firma*, or by dereliction, as when the sea shrinks back below the usual water mark; in these cases the law is held to be, that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. For *de minimis non curat lex*; and besides these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is, therefore, a reciprocal consideration for such possible charge or loss; but if the alluvion or dereliction be * 68 sudden and considerable, * in this case it belongs to the King, for as the King is lord of the sea, and as owner of the soil while it is covered with water, it is but reasonable he should have the soil when the water has left it dry." ¹

(a) 2 Robinson's Appeal Cases, 333.

(b) 4 B. & C. 485.

(c) Vol. 2, p. 262.

¹ See Angell *Tide Waters* (2d ed.), 249 et seq.; Phear *Rights of Water*, 43; Houck *Nav. Rivers*, §§ 242, 248; *Dunlap v. Stetson*, 4 Mason, 349, 366, 367; *Ball v. Slack*, 2 Whart. 508; *Browne v. Kennedy*, 5 Harr. & J. 200;

I am not quite satisfied that the principle *de minimis non curat lex* is the correct explanation of the rule on this subject; because, although the additions may be small and insignificant in their progress, yet, after a lapse of time, by little and little, a very large increase may have taken place which it would not be beneath the law to notice, and of which the party who has the right to it can clearly show that it formerly belonged to him, he ought not to be deprived. I am rather disposed to adopt the reason assigned for the rule by Baron ALDERSON, in the case of *The Hull and Selby Railway Company*, (a) viz., “That which cannot be perceived in its progress is taken to be as if it never had existed at all.” And as Lord ABINGER said in the same case, “The principle” as to gradual accretion “is founded on the necessity which exists for some such rule of law for the permanent protection and adjustment of property.” It must always be borne in mind that the owner of lands does not derive benefit alone, but may suffer loss from the operation of this rule; for if the sea gradually steals upon the land, he loses so much of his property, which is thus silently transferred by the law to the proprietor of the sea-shore. If this be the true ground of the rule, it seems difficult to understand why similar effects, produced by a party’s lawful use of his own land, should be subject to a different law, and still more so if these effects are the result of operations upon neighbouring lands of another proprietor. Whatever may be the nature and character of these operations, they ought not to affect a rule which * applies to a * 69 result and not to the manner of its production.

Of course an exception must always be made of cases where the operations upon the party’s own land are not only calculated, but can be shown to have been intended, to produce this gradual acquisition of the sea-shore, however difficult such proof of intention may be.

If, then, it had been clearly proved or admitted in this case, *New Orleans v. United States*, 10 Peters, 662, 717; 3 Kent, 428; *Chapman v. Hoskins*, 2 Md. Ch. 485; *Halsey v. McCormick*, 18 N. Y. 147; *Adams v. Frothingham*, 3 Mass. 352; *Angell Watercourses* (6th ed.), §§ 53, 54, and notes; *Morgan v. Livingston*, 6 Martin (La.), 19; *Ford v. Lacy*, 7 H. & N. 151; 2 Hall Law Jour. 282, 293; *Nat. Cyclopædia*, vol. 1, tit. Alluvium, pp. 510-513; 1 New Am. Cyclopædia, tit. Alluvium, pp. 390-393; *Commonwealth v. Roxbury*, 9 Gray, 482, 483; *Commonwealth v. Alger*, 7 Cush. 65.

(a) 5 M. & W. 327.

that the additions to the sea-shore in the parishes of Llanelly and Pembrey were of gradual and imperceptible progress, so as to compel me to express an opinion upon the distinction taken by the Crown between accretions produced by nature and by artificial causes, I should have been prepared to repudiate the distinction, and to refuse any further inquiry to ascertain the original medium line of high water, as I consider this proceeding as closely analogous to a bill to ascertain boundaries in which it is necessary for the plaintiff to establish, by the admission of the defendant or by evidence, a clear legal title to some land in the possession of the defendant. *Godfrey v. Littel.* (a) But in this case, although the allegation in the information, "that the alluvial land has not been added to the adjoining main land by the gradual and imperceptible projection of soil and silt upon the sea-shore arising from the operation of natural causes" is ambiguous and may either amount to a denial of the gradual and imperceptible nature of the accretions or of the cause by which they were produced, yet the witnesses for the Crown say that the alluvial land has not been added to the main land gradually and imperceptibly, but rapidly.

Now if by the word "rapidly" the witnesses mean "perceptibly," then the Crown, and not the defendant, * would be entitled to these accretions. But if the witnesses merely mean, that at the expiration of some period of time they could perceive the changes which had taken place, although they could not discern them in their progress, then, I think, another important question may arise, and may call for determination, as to whether circumstances may not exist in which, though the changes were gradual, yet the original limits of the Crown's right, and of that of the owner of the adjoining land, are now capable of being distinctly ascertained.

If there is no clear line of demarcation between the main land and the sea-shore by the gradual encroachment or recession of the tide, all trace of the distinction between them will be completely obliterated, and there will be full scope for the rule of alluvion to operate. But suppose that the separation between the main land and the sea-shore is distinct; as suppose the landowner puts up a wall to prevent the encroachment of the sea upon him, and the effect of the wall is to produce a gradual and

(a) 2 R. & Myl. 633.

insensible accretion, which cannot be perceived from day to day, but at the end of some long period is distinctly to be seen, ought this to become the property of the landowner?

Lord TENTERDEN, in *Rex v. Lord Yarborough*, (a) seems to think that it ought, for he says, “An accretion extremely minute, so minute as to be imperceptible even by known antecedent marks or limits at the end of four or five years, may become, by gradual increase, perceptible by such marks or limits at the end of a century, or even of forty or fifty years. For it is to be remembered, that if the limit on one side be land or something growing or placed thereon, as a tree, a house or a bank, the limit on the other side will be the sea, which rises to a height varying * almost at every tide, and of which the variations * 71 do not depend merely upon the ordinary course of nature at fixed and ascertained periods, but in part also upon the strength and direction of the winds, which are different almost from day to day. And (he adds) considering the word ‘imperceptible’ in this issue as connected with the words ‘slow and gradual,’ we think it must be understood as expressive only of the manner of the accretion, as the other words undoubtedly are, and as meaning imperceptible in its progress, not imperceptible after a long lapse of time.”

This, however, is not in accordance with the great authority upon this subject, Lord HALE. (b) He says, “This *jus alluvionis* is *de jure communi*, by the law of England, the king’s, viz., if by any marks or measures it can be known what is so gained, for if the gain be so insensible and indiscernible by any limits or marks that it cannot be known, *idem est non esse et non apparere*.” Lord HALE here clearly limits the law of gradual accretions to the cases where the boundaries of the sea-shore and adjoining land are so undistinguishable that it is impossible to discover the slow and gradual changes which are from time to time accruing, and when at the end of a long period it is evident that there has been a considerable gain from the shore, yet the exact amount of it, from the want of some mark of the original boundary line, cannot be determined. But where the limits are clear and defined, and the exact space between these limits and the new high-water line can be clearly shown, although from day to day

(a) 3 B. & C. 106. [S. C., 2 Bligh N. S. 147.]

(b) Hargrave’s Law Tracts, p. 28. [See *ante* 55, note (i).]

or even from week to week the progress of the accretion is not discernible, why should a rule be applied which is grounded upon a reason which has no existence in the particular case.

* 72 * In the present state of the evidence it is impossible for me to direct an inquiry to ascertain and lay down the former line of medium high tide, because it could lead to no practical result.

I want information upon a variety of points which is not supplied by the evidence. With respect to the slag embankment, to which the accretions are principally attributed, I cannot discover satisfactory proof whether it is formed on the present sea-shore, or upon that which was formerly sea-shore, or upon the land occupied by Sims & Co.;—whether it extends before the defendant's lands or merely produces effects upon the line of high-water opposite to them, there being some discrepancy in the evidence on this last point;—whether there were originally any bounds or marks by which the sea-shore could be clearly distinguished from the adjoining lands;—and whether the accretions which have taken place were imperceptible in their progress or could be perceived from time to time as they were going on, upon all of which subjects the evidence is, at present, extremely defective and unsatisfactory.

I think it will be absolutely necessary for me to direct issues to be tried for the purpose of ascertaining the following facts:—

1st. Whether by the direct or indirect operation of the acts of the defendant, or of any other person or persons, and by what acts, the natural line of high water before the defendant's lands, in the parishes of Llanelly and Pembrey, has been varied, and if so, to what extent?

2d. Whether the variation, if any, in the natural line of high water has been slow, gradual and imperceptible, or otherwise.

* 73 * 3d. Whether there are or were any marks or bounds by which the natural line of high water can now be ascertained and laid down.

With respect to Mr. Rees there must be similar issues. But, in addition to these, there must be one with reference to the workings of the Pool Colliery Company. The information against him charges that the Pool Colliery Company have sunk a pit and worked a mine under the sea-shore, making certain payments to

the defendant in respect of it. The evidence of the working, however, is, that the Pool Colliery Company have worked the mine for about 120 yards to the south beyond the high-water mark of the spring tides, but that the workings have not extended beyond the high-water mark at neap tides. Now the rights of the Crown neither extend to the spring tides nor are confined to the neap tides, but their limits are the ordinary or medium tides. Although there is proof, therefore, of the Pool Colliery Company working below the spring tides, there is none at all of their having worked below ordinary tides.

There ought to be an issue to inquire whether the Pool Colliery Company have worked the mine below the present or former line of high water at ordinary tides.

Until these facts are determined it is not in my power to dispose of the important questions which these informations involve; although I have thought it right not to withhold my opinion upon some of the questions which were raised in the course of the argument.

* RANGER v. THE GREAT WESTERN RAILWAY * 74
COMPANY.¹

1859. April 27. Before the LORDS JUSTICES.

Production of documents in the possession of a corporation being sought after decree, an order was made directing the company to file a schedule of documents verified by the affidavit of one or more of their officers, unless the company should before a given day satisfy the Court by sufficient evidence, that such affidavit could not be obtained.²

THE question on this appeal motion was, whether the company could be ordered to procure an affidavit as to their possession of documents.

Several of the directors of the company had originally been made parties to the suit, but no officer of the company had been made a party for the purposes of discovery. The company put in, under their corporate seal, an answer containing an ad-

¹ S. C., 5 H. L. Cas. 72.

² See 2 Dan. Ch. Pr. (4th Am. ed.) 1821.

mission of the possession of the documents mentioned in the schedule thereto. A décret had been made many years ago, proceedings under which were still pending, and the plaintiff was now desirous of obtaining the production of other documents which had come into existence since the putting in of the answer. The directors, who had been made defendants, were all now dead, and the company were substantially the only defendants.

In March, 1859, the plaintiff applied by summons in the chambers of Vice-Chancellor KINDERSLEY for an order upon the company to "make and file" an affidavit as to the possession of documents. The case was argued before his Honor in chambers on the 24th of March, and it was contended, on the part of the company, that no such order as was sought could be made, for that the company of course could not itself make an affidavit, and that it could not properly be ordered to procure affidavits from its officers, as it could not compel them to make any. The Vice-Chan-

* 75 cellor held that the plaintiff was entitled * to a discovery upon oath, and considered that the company would have no real difficulty in obtaining affidavits from its officers. His Honor accordingly made the following order: "That the defendants the Great Western Railway Company do, on or before the 24th day of April, 1859, file a full and sufficient affidavit, stating whether they have or have had in their possession or power any, and if any what, documents relating to the matters in question in these suits beyond those mentioned or referred to in the schedules to the said beforementioned answer of the said defendants, and accounting for the same." The order went on to give the usual directions as to production.

On the 11th of April the solicitors of the company wrote to the solicitors of the plaintiff, stating their intention to appeal against the order, but offering to give inspection and to file a schedule of documents under their corporate seal if the plaintiff would waive the filing an affidavit. This offer was declined, and the company now moved before the Lords Justices to discharge the order of the Vice-Chancellor.

Mr. Anderson and *Mr. T. Stevens*, for the company. — The company do not wish to avoid giving any discovery which they are bound to give, but they object to an order commanding them

to procure an affidavit which they cannot either make or compel any one else to make. The practice is regulated by 15 & 16 Vict. c. 86, § 18, which cannot be held to apply to a corporation.

[THE LORD JUSTICE KNIGHT BRUCE. — Does “upon oath” necessarily mean upon the oath of the defendant himself? May it not, in the case of a defendant, who, in the nature of things, cannot take an oath, mean upon oath of some proper person?]

Vice-Chancellor WOOD, *in the case of *Attorney-General* *76 v. *East Dereham Corn Exchange Company*, (a) decided that in this section “upon oath” means upon the oath of the defendant himself.

[THE LORD JUSTICE KNIGHT BRUCE. — Is it not our duty to construe the Act, if possible, so as to suppress the mischief and advance the remedy?]

We submit that the Act was intended only to apply to the case of individual defendants, and not to alter the practice of making officers of a corporation parties for the sake of discovery. As the case now stands the Court has no jurisdiction over the officers of the company, and they cannot be compelled to make an affidavit.

[*Mr. Baily*, for the plaintiff, here referred to *Anon.* (b)]

The plaintiff ought to serve the officers with a *subpœna duces tecum*, or make them parties by a supplemental bill.

[THE LORD JUSTICE TURNER. — Can that be done for this purpose after decree?]

If not, the plaintiff's difficulty is occasioned by his own negligence in not making them parties before.

[*Le Texier v. Margravine of Anspach*, (c) and *Freeman v. Fairlie*, (d) were also referred to.]

(a) 5 W. R. 486.

(b) 1 Vern. 117.

(c) 15 Ves. 159.

(d) 3 Meriv. 29, 44.

Mr. Baily and *Mr. Beavan*, for the plaintiff, were not called upon.

THE LORD JUSTICE KNIGHT BRUCE. — We shall, in my judgment, be acting not against the letter, and be clearly in accordance with the spirit of the Act, if we decide that the plaintiff is entitled, in a case such as the present, to a discovery of documents upon oath.

The Lord Justice TURNER concurred.

After some discussion the following order was substituted for that made by the Vice-Chancellor:—

* 77 * “That the defendants the Great Western Railway Company do, on or before the 1st of June, 1859, file one or more full and sufficient affidavit or affidavits, to be made by one or more of their officers, stating whether they, the said defendants, have or have had in their possession or power any, and if any what, documents relating to the matters in question in these suits, besides those mentioned or referred to in the schedules to the answer of the said defendants to the amended bill in the first mentioned suit, and accounting for the same, unless they, the said defendants, shall, on or before the said 1st day of June, satisfy the Court by sufficient evidence that they are unable to obtain such affidavit or affidavits to be made.

“That the defendants the Great Western Railway Company do, at all seasonable times upon reasonable notice, produce at the office of, &c., all such of the said documents as by such affidavit or affidavits shall appear to be in their possession or power, except such of the same, if any, as they may by such affidavit or affidavits object to produce.”

Liberty to plaintiff to inspect and take extracts, direction for production in Court, &c. Liberty to plaintiff to make any further application as to all or any of the documents. Costs to be dealt with by the Judge to whose Court the cause was attached.

* GRESLEY v. MOUSLEY.¹

* 78

1859. February 22, 24, 26, 28. April 29. Before the LORDS JUSTICES.

A person who has sold an estate under circumstances which entitle him in equity to have the sale set aside, has in the estate an interest of such a nature as to be devisable even by a will made before the passing of the Wills Act.²

Purchase by a solicitor from his client set aside under the circumstances on a bill filed two years after the death of the solicitor, and nearly eighteen years after the death of the client.³

The rules of equity as to a purchase by a solicitor from his client, and the operation of lapse of time upon the right to relief in respect of such a transaction, considered.⁴

THIS was an appeal by the representatives of William Eaton Mousley, a solicitor, from a decree of Vice-Chancellor STUART, setting aside a purchase made by their testator from Sir Roger Gresley, deceased.

The purchase in question was made in 1837. At that time Mr. Mousley was and for many years had been the solicitor, agent and confidential adviser of Sir R. Gresley, and had raised money for him on mortgage, and acted as receiver of his rents. Sir R. Gresley was a gentleman of large property, which, however, was much incumbered; and at the time of the transactions in question, although he was very far from being insolvent, he was in somewhat embarrassed circumstances.

There was no evidence of any written contract for the purchase, nor of any negotiation between Sir R. Gresley and Mr. Mousley with reference to it. The transaction was completed by an indenture of release dated the 18th of February, 1837, grounded on a lease for a year and made between Sir R. Gresley of the first part, W. E. Mousley of the second part, and John Mammatt (a trustee for Mousley) of the third part, and it contained the following recitals: "whereas the said Sir Roger Gresley

¹ S. C., 3 De G., F. & J. 433.

² See *Stump v. Gaby*, 2 De G., M. & G. 623; *Uppington v. Bullen*, 2 D. & War. 184, 1 Con. & L. 291; 1 *Jarman Wills* (3d Eng. ed.), 44.

³ See *Kerr F. & M.* (1st Am. ed.) 307.

⁴ See *Kerr F. & M.* (1st Am. ed.) 298-312; *Coles v. Sims*, 5 De G., M. & G. (Am. ed.) 1, note (1), and cases cited; *Graham v. Birkenhead, &c., Railway Co.*, 2 Mac. & G. 146 note (2), and cases cited.

is entitled in fee-simple in possession to the several manors hereinafter mentioned, &c., and also to the several cottages and pieces of land respectively built upon and enclosed from certain commons or waste grounds belonging to the same manors; and

whereas the said Sir Roger Gresley was lately entitled in * 79 fee-simple * in possession to the closes, pieces or parcels of land and hereditaments described in the two several schedules to these presents, which said closes, &c., comprised in the said first schedule hereto were in or about the year 1825, and which said closes, &c., comprised in the said second schedule hereto were in or about the year 1827, sold and conveyed by the said Sir R. Gresley to various persons, but in the several and respective conveyances thereof were excepted and reserved to the said Sir R. Gresley, his heirs and assigns, all mines and beds of coal, ironstone, and other minerals in, upon, or under the same, with all powers and liberties requisite or necessary for working the said mines, and for discovering, raising, procuring, or carrying away the said coal, iron, &c., subject nevertheless to the payment of such surface rents as in such conveyances are particularly mentioned; and whereas the said Sir R. Gresley has contracted with the said William E. Mousley for the absolute sale to him of the said manors, cottages, &c., with their rights, members, and appurtenances, and of the mines, beds of coal, &c., so excepted or reserved to him as aforesaid, with all such several powers and privileges as aforesaid, and also of all or any other the mines, beds of coal, &c., to which he the said Sir R. Gresley is entitled, as part of the manors aforesaid, or any of them, at or for the price or sum of 6940*l*.” Then the operative part began in the form of an ordinary purchase deed, — in consideration of 6940*l*. mentioned to be paid, the receipt of which was acknowledged in the ordinary form, and the parcels were “all those the manors or lordships, or reputed manors or lordships of Gresley, Church Gresley, Castle Gresley, Swathincote, otherwise Swadlingcote, Newton, Newhouse Heathcote, Harcott, otherwise Hercott, Linton Dalthorpe and Denisthorpe, in the said county of Derby, and also all those the several pieces * or parcels of land, containing * 80 together by estimation forty-five acres or thereabouts, which were formerly part of certain commons or waste grounds within and belonging to the said manors, or some or one of them, but which have been enclosed therefrom; and also all those the sev-

eral cottages which have been built upon the same pieces or parcels of land, or on some part or parts thereof; and also all those the mines, beds of coal, &c., which are upon or under the same closes, &c., respectively comprised and described in the two several schedules to these presents, and which upon the sale and conveyance of the same closes, &c., were so excepted and reserved to him the said Sir R. Gresley, his heirs and assigns, or to which he is entitled as lord of the aforesaid manors, or any or either of them; and also all the powers and privileges excepted and reserved to, and now vested in, the said Sir R. Gresley for working the said mines, and for discovering, raising, procuring, and carrying away the said coal, &c.; and also all other (if any) the mines, &c., to which he the said Sir R. Gresley is entitled in, upon, or under all such lands or hereditaments comprised in certain indentures of lease and release, bearing date respectively the 8th and 9th days of October, 1773, being a conveyance from Hugh Reynell, Esq., to Wilmott Gresley, as are not comprised in the two several schedules to these presents, or one of them." Then followed the usual general words, and the uses of the conveyance were the ordinary uses to bar dower for the benefit of Mr. Mousley, his heirs and assigns; and then followed the usual purchase covenants on the part of a vendor legally and equitably seised in fee.

The schedules to the deed described lands containing in all about 480 acres, but the coal under thirty acres belonged in fact to the Marquis of Hastings. The common *con- * 81 tained about 110 acres, but Sir R. Gresley had previously sold the mines under thirty acres of it to Court Granville.

A receipt for the purchase-money of 6940*l.* in the usual form was indorsed on the deed, signed by Sir R. Gresley, and witnessed by T. Hamilton and J. H. Mousley, a son of W. E. Mousley.

Another deed of the same date and expressed to be made between Sir R. Gresley and W. E. Mousley was executed by Sir R. Gresley. This deed recited among other things the above conveyance, and an existing mortgage to Samuel Maltby for 12,000*l.*, and Sir R. Gresley thereby covenanted with W. E. Mousley, his heirs, executors, administrators, and assigns, that he the said Sir Roger Gresley, his heirs, executors, or administrators, should within six calendar months from that day procure

the legal estate in fee-simple of and in the manor of Church Gresley aforesaid to be well and effectually conveyed, freed, and discharged from the said mortgage debt of 12,000*l.*, and the interest thereof, to the subsisting uses of the above-mentioned conveyance. And that Sir R. Gresley, his heirs, executors, or administrators should in the mean time well and effectually keep indemnified W. E. Mousley, his appointees, heirs, executors, administrators, or assigns, from and against all actions, &c., and all costs, damages, &c., for or by reason or on account of the mortgage debt, and the interest thereof, or any part thereof respectively, or for or by reason or on account of any matter or thing in anywise relating or incidental thereto. This deed was executed by Sir Roger Gresley, and attested by J. H. Mousley.

By a will made in May, 1837, Sir R. Gresley devised all * 82 the real estate of which, as owner, or in execution of * any power he was able to dispose by will, to the Earl of Chesterfield and the Marquis of Londonderry in fee upon trust to sell for payment of debts and mortgages in aid of his personal estate, and subject thereto in trust to settle the same for the separate use of the testator's widow (now Lady Sophia des Væux) for her life, and after her death to the use of the testator's children in tail as therein mentioned, with remainder to the use of the Rev. William Nigel Gresley for life, with remainder to his first and other sons successively in tail male, with divers remainders over.

The testator died in October, 1837, and Mr. Mousley continued to be his solicitor up to his death. He died without issue. The Rev. William Nigel Gresley succeeded to the baronetcy and died in 1847, and the plaintiff, who was his eldest son, attained his majority in 1852.

In 1853 W. E. Mousley died, leaving a will, by which he devised, along with other property, the estate in question to the defendants the Rev. W. E. Mousley and J. H. Mousley, upon certain trusts, and appointed them his executors.

In 1855 the plaintiff, who was not the heir-at-law of Sir R. Gresley, and had no claim to any estates of his except by virtue of the above devise, filed his bill, alleging that W. E. Mousley knowingly purchased the estate at an undervalue; that no part, or at most only a small part, of the purchase-money of 6940*l.* had been paid, and that the bulk of it had been retained by Mousley for costs. The bill prayed that the conveyance might be declared

fraudulent and allowed to stand only as a security for what, if any thing, was due from Sir R. Gresley to Mousley, and for consequential relief.

* It was not disputed by Mousley's representatives that * 83 the purchase had turned out a very advantageous one to him, but they contended that this was chiefly owing to the rise in the value of coal after the time of the purchase, the only valuable part of the property sold being the coal. The Court, however, was satisfied, on the evidence, that the property was at the time worth more than 6940*l.* The surface lands were shown to be worth, at least, 1000*l.* Beside evidence as to estimates made by surveyors some years before the purchase, according to which the coal was of far greater value than the price Mousley gave, it was proved that, in 1829, the coal under the thirty acres of common was sold to Court Granville for 2000*l.*, and that shortly before the purchase now in question a Mr. Nadin, the owner of a neighbouring part of the same coal-field, stated to Mousley that the coals were worth at least 100*l.* an acre, and that he would not sell his own at that rate. There was no doubt, from the evidence, that at the time of the purchase it was known that the beds of coal extended under a great part of the lands mentioned in the schedules. There was no evidence that any of the circumstances most material in estimating the value were ever communicated to Sir R. Gresley. It was alleged that Sir R. Gresley had an independent solicitor in this transaction, viz., Mr. Hamilton, the gentleman who was one of the attesting witnesses to the execution of the conveyance; but the Court did not consider it to be proved that Sir R. Gresley had independent professional assistance.

Vice-Chancellor STUART, at the hearing, set aside the purchase altogether; thus setting it aside not only as against the plaintiff, but also as against Lady Sophia des Væux. His Honor, however, considered that the purchase-money of 6940*l.* must be considered to have been paid, and refused to direct any inquiry on that head. The representatives of Mousley appealed.

* *Mr. Rolt, Mr. Malins, and Mr. G. Lake Russell*, for the * 84 plaintiff, in support of the decree.—It is clearly proved that this was a purchase at an undervalue by a confidential solicitor from a client who was under embarrassments; the transaction, therefore, cannot stand. If the lapse of time shifts the burden of

proof at all, it only does so to the extent of making it incumbent on the plaintiff to prove undervalue, the burden still lies on the defendants to prove that full information was given, or that the client had independent professional advice. *Cane v. Lord Allen*, (a) *Gibson v. Jeyes*, (b) *Holman v. Loynes*, (c) *Charter v. Trevelyan*, (d) *Savery v. King*, (e) *Edwards v. Meyrick*. (g) There is no evidence that the purchase-money was paid, and we ask an inquiry on that head. *Stump v. Gaby* (h) shows that Sir R. Gresley had a devisable interest in the estate, and the plaintiff, therefore, is the proper person to sustain the suit.

Sir R. Bethell, *Mr. Amphlett*, and *Mr. Charles Hall*, for the appellants. — We contend that the plaintiff is not competent to maintain this suit. The will of Sir R. Gresley devised all the estates of which he was owner; he was not owner of this estate, but had at most a mere right to set aside the conveyance. This, by analogy to a right of entry, was not devisable before the Wills Act. *Attorney-General v. Vigors*. (i) The right to impeach the conveyance could not have been assigned, therefore it could not be devised. *Goodright v. Forester*. (k) A devisor must * 85 * have the same estate at his death as he had at the time of making his will; the whole doctrine of revocation is founded on that principle. The *dictum* in *Stump v. Gaby*, and the similar one in *Uppington v. Bullen*, (l) are not founded on authority and are opposed to analogy. Suppose the will had preceded the conveyance, it would have been revoked. *Simpson v. Walker*. (m) The contrary could only be contended on the ground that the transaction was, as in *Hick v. Mors*, (n) a mere creation of an incumbrance; but it was not so, it was intended as an absolute conveyance, and even if voidable effected a revocation, so that if the devisor had subsequently recovered the estate it would not have passed by the devise. *Cave v. Holford*, (o) *Attorney-General v. Vigor*. (p)

(a) 2 Dow, 289.

(b) 6 Ves. 266.

(c) 4 De G., M. & G. 270.

(d) 11 Cl. & Fin. 714.

(e) 5 H. L. Cas. 627.

(g) 2 Hare, 60.

(h) 2 De G., M. & G. 628.

(i) 8 Ves. 256.

(k) 1 Taunt. 578; 8 East, 552.

(l) 2 Dru. & War. 184.

(m) 5 Sim. 1.

(n) Ambl. 215.

(o) 3 Ves. 650, 664.

(p) 8 Ves. 256.

The time which has elapsed is an absolute bar to relief in a case like the present. Even if not, it entirely shifts the burden of proof, and the plaintiff can only succeed by proving a case which would entitle him to relief if the relation of solicitor and client had not existed. The lapse of time does not operate here by raising a presumption of acquiescence, but an effect will be given to it similar to that of the Statute of Limitations for the sake of quieting possession when from lapse of time evidence may be supposed to be lost. The case is one of constructive trust only, and this claim is barred. *Beckford v. Wade*, (a) *Bonney v. Ridgard*, (b) *Champion v. Rigby*, (c) *Gregory v. Gregory*, (d) *Chalmer v. Bradley*, (e) *Roberts v. Tunstall*, (g) *Baker v. Read*, (h) *Selsey v. Rhoades*, (i) *Montesquieu v. Sandys*. (k)

* The decree, at all events, goes too far in setting aside * 86 the sale *in toto*; for we have a personal equity against the tenant for life, and could not raise an issue against our co-defendant.

Mr. Rolt, in reply. — *Stump v. Gaby* proceeds on a sound principle. When a decree is made for setting aside a conveyance it relates back, and the grantee is to be treated as having been, from the first, a trustee for the grantor, who, therefore, has an equitable estate, not a mere right of suit.

As to lapse of time, there is no rule that the Court will not unravel a transaction of this nature after such a period as eighteen years. Every case must stand on its own circumstances. Here the plaintiff has filed a bill within two years after coming of age, and before his reversionary interest has come into possession. Lapse of time, therefore, ought not to affect him.

The transaction was rightly set aside *in toto*; the plaintiff ought not to be embarrassed with questions between the purchaser's representatives and the tenant for life.

Judgment reserved.

(a) 17 Ves. 97.

(b) 1 Cox, 145.

(c) 1 R. & M. 539; Tambl. 421.

(d) G. Coop. 201; Jac. 631.

(e) 1 Jac. & W. 51.

(g) 4 Hare, 257, 264.

(h) 18 Beav. 398.

(i) 1 Bligh N. S. 1.

(k) 18 Ves. 302.

April 29.

THE LORD JUSTICE KNIGHT BRUCE. — The main controversy in this cause is whether the plaintiff is entitled to set aside a sale made by the late Sir Roger Gresley, a landed proprietor in Derbyshire, of a portion of his estates there to Mr. William

Eaton Mousley, a solicitor of the town of Derby. Sir Roger

* 87 * Gresley may be taken to have been at the time of the sale seised in fee legally and equitably of part of the property sold, and seised in fee of the equity of redemption of the other part of it, subject to some mortgage or mortgages on which money was then due. The transaction was completed very early in the year 1837, so far at least that there was then a conveyance executed by Sir Roger Gresley in proper form and regular according to law, and perhaps the purchase-money or alleged purchase-money, the amount or nominal amount of which was 6940*l.*, was then also paid either in money or by way of set-off or allowance against a debt of equal or greater amount due, or treated as due, to the purchaser from the vendor. However this may have been, we cannot on the present occasion assume that the alleged purchase-money was not in some manner satisfied. The conveyance was dated the 18th of February, 1837, and was in substance thus: [His Lordship here stated the recitals and the effect of the conveyance nearly in the terms in which they are set out above.]

I have used the phrase “in proper form and regular according to law.” That perhaps is not strictly accurate, for as I have said Sir Roger Gresley had in some of the property an equitable interest only to convey, though the conveyance treats him as legally seised in fee of the whole without any incumbrance, and by it he covenants accordingly. It was however accompanied by a deed of the same date, also executed by Sir Roger Gresley, in these words: [His Lordship here read the material parts of the deed of covenant mentioned above.]

There is no proof of any written or verbal contract for the purchase having existed, the mere common form recital contained in the conveyance amounting of course in substance to nothing.

* 88 I agree, however, that the fifth paragraph * of the amended bill may be read as alleging a written contract. The purchaser took or was let into possession of the purchased property, and probably from the time of the sale. A will was made by Sir

Roger Gresley in the month of May, 1837, by which he devised his real estate in language and terms sufficient to include and pass such devisable interest, if any, as he then had in the property conveyed as I have said. The devise was to trustees upon trusts in effect for his wife (who is still living), the defendant Lady Sophia des Væux, for her life for her sole use independently of any husband, with remainder to Sir William Nigel Gresley for life, with remainder in tail to the plaintiff in this suit, who attained his majority in the year 1852. The testator died in the month of October, 1837, Sir William Nigel Gresley in the year 1847. The bill before us seeking to set aside the sale was, in its original form, filed in April, 1855, and brought into its present state by amendment in the year 1856, in which year or previously all the defendants appeared. Time and delay consequently do not bar the suit, though the late period of its institution, coupled with the fact that Mr. Mousley died in the year 1853, and the deaths of Sir Roger Gresley, and Mr. Hamilton, one of the attesting witnesses to the conveyance, who died some years before the filing of the original bill, may, independently of any notion of confirmation or of acquiescence, be very possibly with propriety considered as detracting in some degree from the weight of the evidence adduced on the part of the plaintiff, and rendering a certain amount of presumption against him reasonable.

The grounds on which he seeks relief are that the sale was at an undervalue, and was made to a solicitor by his client, who was at the time embarrassed to some extent and much in debt, which allegations appear to me * fully proved ; a state- * 89 ment however to be taken subject to this, that Sir Roger Gresley was far from insolvent, and had all along available property very considerably more than sufficient for the payment of all his debts, and subject also to the other observations already made by me. It is certain, that from a time preceding the year 1830 continually until Sir Roger Gresley's death, Mr. Mousley was and acted as his solicitor. It is, I conceive, clearly proved that for many, for more than seven, years next before that event Mr. Mousley was professionally as a solicitor his confidential adviser, nor is it in my opinion proved, or to be inferred or believed, that in the transaction, of February, 1837, or on the subject of it, Sir Roger Gresley had any other adviser, or any other assistance.¹

¹ Kerr F. & M. (1st Am. ed.) 164, 165.

Mr. Hamilton was the London agent of Mr. Mousley, and the other attesting witness to the conveyance, who at that time was very young, and is one of the appellants before us, is a son of Mr. Mousley. Undervalue to a material extent is proved as I view the evidence. For it appears to me, that whether upon the point of value we take or do not take into account events which happened after the sale, the property sold was at the time of the sale worth plainly and clearly more than 7500*l*. It is, I think, equally manifest that from a time preceding the year 1837, down to Sir Roger Gresley's death, he was, though a man of large property and much more than solvent, yet a man owing large debts and somewhat hampered in his circumstances.

The questions accordingly are, first, whether if Sir Roger Gresley had a title in equity to be relieved against the sale, he had after the sale a devisable interest in the property sold; secondly, whether a case of confirmation or acquiescence has been established against Sir Roger Gresley or the plaintiff; and, thirdly, whether, in the circumstances to which I have re-

* 90 ferred, there ought to be * a presumption in favour of Mr.

Mousley's representatives of facts sufficient to defeat the suit; which three questions must, I agree with the Vice-Chancellor in thinking, be answered in the plaintiff's favour. The first is concluded by the cases decided by Lord ST. LEONARDS that were mentioned in the argument, if we are bound by those authorities. But if we are not, I still think that the decisions were correct and ought to be followed.

With regard to the second question, there is not, I think, reasonable ground for contending, that as between Sir Roger Gresley and Mr. Mousley there was, or that by the plaintiff or as against the plaintiff there has been, confirmation or acquiescence, the plaintiff not having been born before the year 1831, Sir Roger Gresley having died in 1837, and Mr. Mousley having continued his solicitor, his confidential solicitor, until that event, and having for some years next after it been the solicitor of his executors and the trustees of his will in that character, and of his widow. Whether that lady has as to herself confirmed or acquiesced I say not, nor have the means of saying. Then with regard to the third question, it is not proved, nor is there I think reason to believe, that any important paper, important book, or material document has been destroyed or mutilated, defaced, lost, or

misaid ; an observation subject to this, that certain documents or papers belonging to Sir Roger Gresley were after his death, as to some, destroyed by Mr. Mousley, and as to others possessed by him. I do not mean, however, any other than a perfectly innocent destruction, or any other than a perfectly fair possession. I consider it not to be shown, and not to be probable, that any material testimony has been lost other than such evidence as Sir Roger Gresley, Mr. Mousley, and Mr. Hamilton, or some or one of them, might, if alive and examined, have given. In my judgment, however, there *is not the least degree of proba- * 91 bility that if litigation for the purpose of setting aside the sale had been commenced before the year 1838, and each, or any one or more of those three gentlemen had been among the witnesses in the cause, the evidence that we have on the part of the appellants would have been materially added to, or any important portion of the evidence before us on the present plaintiff's part contradicted, answered, explained away, or displaced ; a remark which I make subject and only subject to this, that very possibly the transaction of the mortgage of February, 1837, to Mr. Eaton might so have been satisfactorily explained, and the payment or satisfaction of the 6940*l.* wholly, or in part, might so have been plainly proved or plainly disproved. The intimate relation, however, of solicitor and client, the client's temporary difficulties, and the undervalue seemed to me proved to demonstration. It must be remembered too that Mr. Mousley in 1837, the year of the purchase, the year in which Sir Roger Gresley made his will also and died, was aware of the contents of the will. It must be recollected likewise that Mr. Mousley's life terminated in 1853, and that he as a solicitor whose case was that he had bought real property of his client must (I think it not too much to say) be taken to have been all along conscious that if the purchase should be impeached, at least within twenty years from its date, the burthen of sustaining it would certainly or probably be on the purchaser.¹ I cannot consider it likely that he would have been careless of preserving any evidence that existed, if any did exist, of a nature favourable to the support of the transaction ; and my impression is against assuming at present as a fact that the purchase-money, or alleged purchase-money, of 6940*l.* (stated I think in a draft of the conveyance as 7000*l.*) was paid or satisfied. As

¹ See Kerr F. & M. (1st Am. ed.) 151, 152.

to this, there should I conceive be an inquiry, and in that and
 * 92 a few other respects the terms in which * the decree has been
 drawn up should (we are of opinion) receive some altera-
 tions, especially as it seems to us to operate in favour of Lady
 Sophia des Væux more than in this suit justice requires, though
 she may possibly be entitled substantially to the same relief in
 another. We have prepared minutes which shall be stated at
 the conclusion of the observations that my learned brother is
 about to make. Those minutes, however, will be open to any
 suggestions from the bar on this or a future day, consistent with
 the principles on which we proceed.

THE LORD JUSTICE TURNER. — This is an appeal from a decree
 of the Vice-Chancellor Sir JOHN STUART, by which his Honor has
 set aside a purchase by a solicitor from his client, at the suit of a
 devisee in remainder under the will of the client. The appeal
 opens three points for our consideration. First, whether the
 plaintiff has any title to sue for the purpose of impeaching the
 purchase. Secondly, whether the purchase was originally im-
 peachable, and if so whether it has become unimpeachable by
 lapse of time ; and, thirdly, whether the decree has or has not
 gone further than it ought to have done, and, if it has, what de-
 cree ought to have been pronounced.

The first point arises thus : The will under which the plain-
 tiff claims title was executed after the conveyance had been made
 to the solicitor, the purchaser, upon the occasion of the purchase
 in question, and it is, therefore, insisted on the part of the appel-
 lants, the devisees of the purchaser, that the testator had not, at
 the time of the execution of his will or at any time afterwards,
 any estate or interest in the property ; that he had merely a right
 of suit to recover it, which right, it was said, was analogous
 * 93 to a right of entry, and could not pass by devise.¹ * This
 argument, on the part of the appellants, was not supported
 by any authority ; on the contrary, it was admitted that the cases
 of *Upperton v. Bullen* and *Stump v. Gaby*, which were referred
 to in the argument, were opposed to it. Those cases, however,
 were called in question, and it was insisted that the decision of
 the case ought to be governed by the analogy contended for be-

¹ Rights of entry, either by statute or by construction of law, are devisable
 in many of the United States. 1 Jarman Wills (4th Am. ed.), 88, note (1).

tween the right of suit which the testator in this case had and a mere right of entry. It is hardly necessary to say, that I should hesitate long before I should venture to dissent from authorities of at least equal weight with our own, even if I had strong doubts upon the subject; but, on considering the decisions referred to, I am by no means disposed to dissent from them. I think the analogy contended for does not exist. A right of entry is the foundation of proceedings to recover an estate. The exercise of it is the course prescribed by law for restoring the seisin which has been displaced, and without which the estate cannot be recovered. A devise of a right of entry, therefore, is no more than a devise of the right to institute proceedings for recovering an estate; but where a purchase is voidable in equity there is no question of restoring the seisin before instituting proceedings to avoid it. The interest in the estate which gives the right to avoid it exists independently of any act to be done by the party seeking the avoidance. The decree of the Court avoiding the purchase does not, as was suggested in argument, create a wholly new right; it proceeds upon a pre-existing right. The mere circumstance of an estate not being recoverable otherwise than by action or suit clearly does not prevent it from being devisable. That point is well settled by *Doe v. Hull* (a) and *Culley v. Doe*; (b) and it would be most dangerous to unsettle the point, for if it was ruled otherwise no valid devise could * be * 94 made by a testator who was out of possession and whose title was disputed. Whether we look, therefore, to the distinction between a mere right of entry and a suit of this description, or to the law as settled upon the power to devise, notwithstanding the title is disputed, I see no ground for holding that the plaintiff is not entitled to sue for the purpose of setting aside this purchase. It was attempted, however, to strengthen the appellant's argument on this part of the case by reference to the authorities as to the revocation of wills by conveyances which are void in equity only; but those cases do not seem to me to apply to the present. They proceed upon the ground that the conveyance, although void in equity, evidences an intention to make a different disposition, and, therefore, to revoke the devise; but here there is certainly no evidence of intention not to devise. In my

(a) 2 Dowl. & R. 38.

(b) 11 Ad. & E. 1021.

opinion, therefore, the plaintiff is well entitled to maintain this suit, and the appeal cannot be supported on this point.

With respect to the second point, whether the purchase in question was originally impeachable, and if so whether it has become unimpeachable by lapse of time, so many cases of dealings between solicitors and their clients have of late come before the Courts, that I have been led to doubt whether an impression has not prevailed that the rules of this Court, which govern such transactions, have been in some degree relaxed. I think it right to state, therefore, most distinctly, for the information of those who venture to engage in such transactions, that this is by no means my understanding of the subject, and that they must expect to be held bound to the strict observance of all the obligations which those rules impose upon them, and to the proof that those obligations have been observed. The luminous exposition * 95 of the nature and extent of those obligations which * is contained in the case of *Gibson v. Jeyes*, renders it quite unnecessary to detail them. It may be useful, however, to say a few words as to the operation of lapse of time in cases of this description. Lord CAMDEN, in *Smith v. Clay*, (a) speaking generally of the effect of length of time in Courts of Equity, says this: A Court of Equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands where the party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this Court into activity but conscience, good faith, and reasonable diligence. Where these are wanting the Court is passive and does nothing; laches and neglect are always discountenanced, and, therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this Court." And again, he says, " 'Expediit reipublicæ ut sit finis litium' is a maxim that has prevailed in this Court in all times without the help of an Act of Parliament; but, as the Court has no legislative authority, it could not properly define the time of bar by a positive rule, to an hour, a minute, or a year. It was governed by circumstances." These are principles which, as it seems to me, are not limited in their application to the case which called forth the expression of them, but apply generally to all cases. I refer to them more particularly because, in the argument before us, an attempt was

(a) 3 Bro. C. C. 639.

made to limit the time beyond which the Court would not interfere in a case of this description ; and I think that, independently of statutory limitation, either express, or analogous where analogy applies, no such limit of time can be imposed. The Court must, as Lord CAMDEN says, be governed in each case by its circumstances.¹ Besides these principles, which apply generally to all cases, there is, I think, another principle which applies specially to cases of dealings between * solicitor and client * 96 and other parties standing towards each other in the like relation, — that during the continuance of the relation the same weight ought not to be given to the lapse of time as is justly due to it when no such relation subsists.² I do not say that no weight can be given to it. This case does not, in my opinion, call for the decision of that point ; and, having regard to the position of other parties in the cause, I think it would be wrong to prejudice the question by any observations upon it. The principles to which I have referred are those by which we ought, as I think, to be governed in deciding this case.

Then what are the facts to which those principles are to be applied. The purchase in question was made in the month of February, 1837. Mr. Mousley, the purchaser, was the solicitor of Sir Roger Gresley, the vendor, at the time of the purchase, and continued to be so up to the time of Sir Roger's death, in the month of October in the same year. This purchase was carried into effect by deeds of the 17th and 18th of July, 1837. [His Lordship then, after stating the particulars of the property sold and summing up the evidence as to its value at the time of the sale, proceeded as follows :] With all these facts appearing upon the evidence before us it is, I think, scarcely possible to doubt that the 6940*l.* was not the fair value of the property comprised in this purchase. Supposing, however, this point to be more open to doubt than I consider it to be, what a case do these facts present as to the duty of Mousley. Was it not his duty to have obtained the very best advice on the part of Sir Roger Gresley as to the value of this property before he himself became the purchaser of it? Ought he not, at least, to have inquired of Court Granville and of the owners and occupiers of the property adjoining the Gresley Hall estate what they would have

¹ See 1 Dart V. & P. (4th Eng. ed.) 41.

² See Kerr F. & M. (1st Am. ed.) 307.

* 97 given for * these mines? Ought he not to have told Sir

Roger Gresley of the information which he had from Nadin? Would he not have been bound to obtain this advice, to make these inquiries, and to give this information, if any other person than himself had been the purchaser? But no evidence is given that any such advice was sought or taken, any such inquiries made or any such information given. The defendants the appellants relied much upon Sir Roger Gresley's knowledge of the property, upon the failure of previous attempts which he had made to sell, and particularly upon its having been offered to be sold to the Marquis of Hastings for 6000*l.*, and of the offer having been refused on the ground of the price which was asked being excessive; but this offer, it is to be observed, was in the year 1853, and the sale to Court Granville, at a much higher price, took place afterwards: and, besides, it is evident that the answer on the part of the Marquis of Hastings to this offer was framed for the purpose of reducing, as far as possible, the value of the property, and it was Mousley's duty to have pointed out this to Sir Roger Gresley; and, as to Sir Roger's knowledge of the property, the question is not what Sir Roger knew, but what Mousley was bound to have advised. However great a client's knowledge may be as to the value of the property which he is about to sell, he must require advice as to the steps to be taken and the inquiries to be made with reference to the sale; and it is one of the most important duties of his solicitor to advise him on those points. The defendants rely also as to the value of the property upon the improved access to it which has been opened since the sale, and upon some faults which exist or are supposed to exist in the mines; but it appears from the plan before us, that these faults, supposing them to exist, would not affect the eighty acres, and it is by no means clear, upon the evidence, that they

* 98 would in any material degree affect the value * of the rest of the mines; and, at all events, inquiry ought to have been made to what extent, if any, they were likely to do so, and Sir Roger should have been advised upon it. And as to the improved access, the prospect of it could not but have been known at the time to Mr. Mousley, a solicitor of large practice in the neighbourhood, and he was bound to have pointed it out to Sir Roger. It is attempted, on the part of the defendants, to prove that Mr. Hamilton acted as the solicitor of Sir Roger Gresley in this trans-

action; but I think that, upon the evidence, this attempt entirely fails.

The great point, however, on which the defendants relied, is the difficulty under which they are placed in consequence of the lapse of time and the impossibility, as it was said, of procuring full evidence of the character of the transactions at so remote a period, more especially with reference to the death of Mr. Mousley, who died in 1853; and no doubt these considerations are entitled to some weight. But, on the other hand, we must remember that Sir Roger Gresley's papers passed upon his death into the hands of Mr. Mousley, and that Mr. Mousley acted for many years as the solicitor for the trustees under Sir Roger's will, and that if those papers furnished evidence in support of this transaction, that evidence might well have been preserved. The papers which have been preserved, and which have been adduced in evidence in this cause, tend I think in the opposite direction, as they prove the continued embarrassment of Sir R. Gresley. We must remember too that if the inquiries which ought to have been made had been made, there can be no reasonable doubt that some at least of the persons of whom they were made could have been called to prove them; but what is yet more important to be remembered is this, that Mr. Mousley, as a solicitor, must have known that the *onus* of supporting *this * 99 transaction would rest upon him, and that if he desired that it should be upheld he must preserve the evidence which would be required to support it. Solicitors who deal with their clients must take care not only that the transaction is fair, but that they are in a condition to prove that it was fair.¹ In this case I am of opinion that the purchase in question cannot be maintained as against the plaintiff. I think that it was bad in its inception. Whether, having regard to the continuance of the relation of solicitor and client, it could have been maintained had Sir Roger Gresley lived for any considerable period of time without having sought to impeach it, I purposely abstain from giving an opinion, as it might affect a question which may yet arise between some

¹ See *Holman v. Loynes*, 4 De G., M. & G. 270, and cases in note (1); *Hesse v. Briant*, 6 De G., M. & G. 623; *Savery v. King*, 5 H. L. Cas. 627; *Knight v. Bowyer*, 2 De G. & J. 421, 445; *Kerr F. & M.* (1st Am. ed.) 165, and cases in notes; 1 *Dart V. & P.* (4th Eng. ed.) 32, 33; *Gresley v. Mousley*, 3 De G., F. & J. 433.

of the parties in this cause ; but I am of opinion that the time which elapsed between the date of this purchase and the death of Sir Roger Gresley (the relation of solicitor and client having continued during the whole of that time) was far too short to give the transaction any validity ; and I think that neither the time which has elapsed, nor any thing which appears by the evidence to have occurred, since Sir Roger's death, can avail against the plaintiff.

The question then arises upon the extent and form of the decree. The decree has gone the length of setting aside the transaction *in toto*, and it operates therefore for the benefit of Sir Charles and Lady Des Væux, who are defendants to this bill ; but if the operation of length of time depends, as I have taken it to do, upon the circumstances of each case, it is plain that there may be circumstances, which may affect these latter parties which are of no avail against the plaintiff, and the case is not I think one in which it is necessary to decide the rights between co-

defendants for the purpose of working out the plaintiff's
 * 100 equity, nor, if it was such a case, would it * be proper to decide those rights without some previous inquiry. I think, therefore, the decree has in this respect gone too far, and must be varied accordingly : but as on the one hand we do not uphold the decision so far as it operates in favour of Sir Charles and Lady Des Væux, so on the other hand we must, I think, be careful to decide nothing against them. Whatever questions there may be between them and the defendants the Mousleys must be left open. I have said nothing about the payment of the purchase-money, but I think there must be an inquiry on that point.

His Lordship then stated the form of the decree to be made, which was in substance as follows : —

That the decree dated the 10th of July, 1858, be varied, and as varied stand as follows : —

Declare that the sale in the pleadings mentioned to have been made by Sir R. Gresley deceased in the pleadings named to W. E. Mousley deceased in the pleadings also named of the manors, &c., comprised in the indentures of the 17th and 18th days of February, 1837, in the pleadings mentioned, and the said indentures of the 17th and 18th days of February, 1837, was and were

void in equity as against the said Sir R. Gresley, and is and are void in equity as against the said plaintiff.

Declare that, notwithstanding the said sale and the said indentures, the plaintiff upon the death of the said Sir R. Gresley became entitled in equity under his will as against the said W. E. Mousley to the said manors, &c., as tenant in tail in remainder expectant on the decease of the defendant Dame Sophia Katherine Des Væux, and that, except as to the parts thereof which have been sold since the date and execution of the said indentures (the plaintiff by his bill having offered to adopt such * sales), he the said plaintiff is now so entitled, subject, * 101 however, to the payment in such manner as this Court shall direct of what (if any thing) the defendants W. E. Mousley and J. H. Mousley may, upon the result of the account and inquiries hereafter directed, appear to be justly entitled to as against the plaintiff, and subject also to such leases as may since the date and execution of the said indentures have been made of the unsold parts of the said manors, lands, &c.; the plaintiff by his counsel undertaking not to disturb such leases, in so far as the same may not be binding upon him.

Order the following accounts and inquiries: 1. An inquiry whether the sum of 6940*l.* in the said indenture of 18th February, 1837, mentioned, or any and what part thereof, was ever and when in any and what manner paid or satisfied by the said W. E. Mousley deceased to the said Sir R. Gresley deceased, or was at the time of the date and execution of the said indenture owing from the said Sir R. Gresley to the said W. E. Mousley, over and above and in addition to the sum of 7724*l.* secured by the mortgage of the 21st day of February, 1837, in the pleadings mentioned. 2. (Inquiry as to sales and leases by Mousley and the trustees of his will, and when, to whom, under what circumstances, and for what considerations, and whether any thing and what remained due in respect of the considerations for the same, and from whom.) 3. An account of all and every sums and sum of money received by W. E. Mousley in his lifetime, or by the defendants W. E. Mousley and J. H. Mousley, or either of them, since his decease, or by any person or persons by their or either of their order, &c., in respect of any such sale or sales, lease or leases, or otherwise, for or in respect of any rents or profits of the said manors, &c., or any part or parts thereof, not being

* 102 the annual * profits of lands, or the profits of mines opened in the lifetime of the said Sir R. Gresley, or the profits or produce of any of the said manors, &c., included in any such sale or sales as aforesaid, accrued or obtained subsequently to such sale or sales. 4. (Inquiry what mines were opened during the life of Sir R. Gresley, and what since, and when, and by whom, and under what circumstances: just allowances. Directions to tax costs of all parties except W. E. Mousley and J. H. Mousley, reserving the consideration of payment. Costs of appeal to be costs in the cause, to be dealt with as part of the costs subsequent to the decree by the Judge who shall hear the cause for further consideration. Return the deposit. Adjourn further consideration before the said Judge. Liberty to apply.) And this order is to be without prejudice to any question as to the rights of the parties in respect of what upon the taking of the said account shall appear to have been received otherwise than in respect of any sale or sales, and as to interest, and without prejudice also to any question between the defendants or any of them in respect of the life interest of the said defendant Dame S. K. des Væux.

1859. April 29. Before the LORDS JUSTICES.

Where a lunatic who had recovered petitioned for a *supersedeas* of the commission, *Held*, that the Court could not order him to pay the expenses incurred with reference to it.

THIS was a petition for a *supersedeas* of a commission of lunacy under which the petitioner had been found lunatic. It appeared by the evidence that he had now recovered. The usual inquiries were in progress before the Master, but no property of the lunatic had been taken possession of under the lunacy, nor had any committee been yet appointed.

Mr. Beck supported the petition.

Mr. Eddis, for the father of the petitioner, who had obtained the commission and incurred expenses with reference to it, asked

that the petitioner might be ordered to indemnify his father in respect of these expenses.

The following cases were referred to : *Ex parte Ferne*, (a) *Sherwood v. Sanderson*, (b) *Re Pinks*, (c) *Ex parte Glover*, (d) *Ex parte Loveday*, (e) 16 & 17 Vict. c. 70, § 152.

Their Lordships held that they had no authority to order payment of the expenses.

* LYDDON v. MOSS.

* 104

1859. March 12, 14, 19, 21, 22. April 29. Before the LORDS JUSTICES.

An agreement between a solicitor and a client without the intervention of any other solicitor, to allow the solicitor interest on his bill of costs, cannot be maintained independently of subsequent acquiescence, unless it appears that he informed the client that the law allowed no such charge.¹

But where the relation of solicitor and client had ceased after such an agreement had been made, and the client subsequently (having in the mean time had proper advice upon the subject of the agreement) entered into a second agreement with the solicitor, in part founded on the former, which she did not seek to impeach till fourteen years after its date: *Held*, that there had been such delay and acquiescence as to preclude any title to relief.²

THIS was the appeal of the defendant John Moss from the decree of the Master of the Rolls, setting aside a deed whereby the plaintiff assigned to the appellant, who was at that time her solicitor, a sum of 3000*l.* in satisfaction of costs.

The plaintiff was the widow of William Lyddon, Esq., who died on the 17th of January, 1843. The appellant had acted as

(a) 5 Ves. 832.

(d) 1 Meriv. 269.

(b) 19 Ves. 280.

(e) 1 De G., M. & G. 275.

(c) 12 L. J. N. S. Ch. 57.

¹ See *Vigers v. Pike*, 8 Cl. & Fin. 652; *Charter v. Trevelyan*, 11 Cl. & Fin. 714; 1 Story Eq. Jur. § 312 a; *Morgan v. Higgins*, 5 Jur. N. S. 236; S. C., 1 Giff. 270; Kerr F. & M. (1st Am. ed.) 166.

² See Kerr F. & M. (1st Am. ed.) 301, 302, 304, 305; *Wright v. Vanderplank*, 8 De G., M. & G. 132, note (1); *Stump v. Gaby*, 2 De G., M. & G. 623, note (1), and cases cited; 1 Sugden V. & P. (8th Am. ed.) 252, 253, and notes; *Perry Trusts*, § 869.

the solicitor and legal adviser of William Lyddon in certain suits of *Lyddon v. Woolcock* and *Lyddon v. Jackson*, in which William Lyddon was plaintiff, and which had for their object the sale and administration of the real and personal estates formerly of Julia Lyddon deceased, the former wife of William Lyddon. After the death of William Lyddon, the appellant continued to act as the solicitor and legal professional adviser of the plaintiff in the same suits, she being the executrix and sole legal personal representative of her husband, and having revived the suits as plaintiff.

On the 17th of October, 1844, by agreement between Messrs. Richardson & Smith, the solicitors of Mr. Parkyn (a defendant in the suit of *Lyddon v. Woolcock*), and the appellant, the plaintiff's claims under the chancery suits, as executrix of William Lyddon, were agreed to be compromised upon the following terms contained in a letter from Messrs. Richardson & Smith to the appellant: —

* 105 * “Royal Hotel, Derby, 17th October, 1844. Dear Sir, — *Lyddon v. Woolcock*, — With reference to our conversation of this morning upon the subject of a compromise, we on behalf of Mr. Parkyn beg to agree — 1. To allow Mrs. Lyddon, as the representative of her late husband, to maintain her claim in the Master's office for 1500*l.* in respect of the brick debt. 2. To allow her, as such representative as aforesaid, to maintain her claim in the Master's office for 3000*l.* in respect of the bill debt of 4783*l.* 16*s.* 7*d.*, and all other her claims as such representative upon the estate of the late Mrs. Julia Lyddon, in any respect whatsoever, except such arrears of rent and accumulation thereof as Mr. Lyddon claimed to be entitled to as tenant for life from her death until his own decease, all his right to which Mrs. Lyddon, as his representative, claims to be entitled to and intends to reserve, it being distinctly understood that the question as to the fund, which shall bear the costs already taxed and alluded to in the decree of 22d December, 1841, shall remain open and in its present state in all respects. 3. That the future proceedings in this suit shall be conducted by us on behalf of the plaintiff, and that you shall deliver to us the papers in the same. 4. That Mrs. Lyddon shall not be called upon, as such personal representative, for any money as being due from her to the estate of Mrs. Julia Lyddon. 5. That interest shall be allowed upon the amounts of

the aforesaid debts to Mrs. Lyddon, at 4l. per cent, from the time they shall be allowed. 6. The balance of Mr. Moss's costs, ordered by the decree aforesaid to be paid, are still to have a prior claim upon the funds in the suit, and all subsequent costs to be likewise allowed up to the present time as between solicitor and client."

The appellant signed at the foot of this letter the following memorandum: "I agree on behalf of Mrs. * Lyddon to * 106 the terms of the above letter, 17th October, 1844. — JOHN Moss."

A decree in the suit of *Lyddon v. Woolcock*, and the other suits connected with it, was accordingly made by consent in conformity with the above terms.

On the 19th of October, 1844, the deed was executed which it was the object of the suit to set aside. It was dated on that day, and made between the plaintiff of the one part and the appellant of the other part. It recited that the plaintiff was indebted to the appellant for costs and disbursements and for interest agreed to be allowed to him. And it contained other recitals which will be found stated in the judgment. (a) By the operative part the plaintiff assigned the 3000l. (to which she was entitled under the decree by consent) to the appellant in discharge of the amounts due to him.

The bill stated that this deed was prepared by the appellant, and was taken by him on the 19th of October, 1844, to the residence of Sir Henry Every (the plaintiff's uncle, and a trustee under her marriage settlement), with whom the plaintiff was then staying, and tendered to the plaintiff for her execution, but was not perused by any solicitor or legal professional person for or on behalf of the plaintiff, and that she had no legal professional advice on the subject of the deed previously to her signing it. That, before the date of the deed, the appellant had received payment to the amount of nearly 3000l. from the funds in Court, in the suit of *Lyddon v. Woolcock*, in respect of his taxed bill of costs, as solicitor for William Lyddon and the plaintiff; and that previously to the signature by the plaintiff of the deed, no complete bill of costs, nor any complete account of charges, expenses, or disbursements, against * William Lyddon and the plain- * 107 tiff, or either of them, had been delivered by or on behalf of

(a) *Post*, p. 113.

the appellant to William Lyddon, in his lifetime, or to the plaintiff, or any person or persons on behalf of the said William Lyddon and the plaintiff, or either of them. That in the month of October, 1844, after the plaintiff had signed the deed, the appellant delivered to the plaintiff's then solicitor accounts purporting to be the bills of costs which formed the consideration for the deed, and which amounted in the whole to 3021*l.* 7*s.* 6*d.*; but that such last-mentioned bills were grossly incorrect, and contained numerous items of overcharge, and charges whereof payment never could be properly or legally enforced. That the plaintiff had for some time refused to execute the deed, but was ultimately induced to sign her name to it, partly through the representations made to her and to Sir Henry Every by the appellant, to the effect that if the plaintiff refused to execute the deed, she would be involved in long-continued litigation, and would incur serious risk; but that, if she raised no difficulties, and executed the same, the suits would be soon settled, and the plaintiff would within six months receive the money due to her therefrom. The bill also stated an indenture dated the 13th of December, 1845, whereby the appellant assigned to his sisters, two other defendants (amongst other things), the 3000*l.* and interest assigned to him by the deed in question.

The prayer was, that the deed might be delivered up to be cancelled, or the defendants ordered to reassign to the plaintiff the property therein comprised at the costs of the defendants, or otherwise that the appellant might be ordered to deliver to the plaintiff a bill or bills duly signed by him of all costs,
 * 108 charges, and disbursements * claimed by him as being due at the date of the execution of the deed, and forming the consideration for it; and that such bill or bills might be referred for taxation; and that the deed might be declared to be a security only for the amount at which the taxing-officer should tax the bill, and for consequential relief.

The other facts of the case and the arguments appear sufficiently from the judgments.

Mr. Selwyn and *Mr. Faber* were for the plaintiff.

Sir R. Bethell, *Mr. R. Palmer*, and *Mr. Webster*, for the appellant *Mr. Moss*.

The following cases were referred to: *Moss v. Bainbrigge*, (a) *Cooke v. Setree*, (b) *Waters v. Taylor*, (c) *Horlock v. Smith*, (d) *Morse v. Royal*, (e) *Clegg v. Edmonson*, (g) *Clarke v. Hart*, (h) *Holmon v. Loynes*, (i) *Savery v. King*, (k) *Wood v. Downes*, (l) *Montesquieu v. Sandys*, (m) *Attorney-General v. Dudley*, (n) *Blagrove v. Routh*, (o) *Simpson v. Lamb*, (p) *Campbell v. Fleming*. (q)

Judgment reserved.

* THE LORD JUSTICE TURNER. — This is a case between * 109 solicitor and client. Mrs. Lyddon, the plaintiff in this suit, is the widow and personal representative of William Lyddon, and she is also entitled under the settlement made upon her marriage with him to some part of the funds connected with this litigation. William Lyddon, her late husband, had in his lifetime claims against the estate of Julia Lyddon, his first wife, who died in the year 1828; first, for bricks supplied by him, and applied in building on her estates, in these pleadings called the brick debt; and, secondly, for the payment of bills and other debts given and contracted by him on account of improvements on her estates, in these pleadings called the bill debt; and, subject to these claims and other charges, he was tenant for life of her estates under her will. Upon his marriage with the plaintiff in the year 1831, he assigned his claims upon the estate of his first wife to the extent of 1500*l.* to Sir Henry Every, the plaintiff's uncle, and the defendant John Moss, as trustees for the plaintiff. In the year 1832 he instituted a suit in this Court, for the purpose of enforcing his claims against the estate of Julia Lyddon, his first wife, and for the administration of her estate. The defendant John Moss, who had before acted as his solicitor in other matters, became, and until his death continued to be, his solicitor in this suit. The claims which he set up in this suit appear to have been

(a) 6 De G., M. & G. 292.

(b) 1 Ves. & Bea. 126.

(c) 2 Myl. & Cr. 526.

(h) 6 H. L. Cas. 633; 6 De G., M. & G. 232.

(i) 4 De G., M. & G. 270.

(k) 5 H. L. Cas. 627.

(l) 18 Ves. 120.

(m) 18 Ves. 302.

(d) 2 Myl. & Cr. 495.

(e) 12 Ves. 355.

(g) 3 Jur. N. S. 299.

(n) Coop. 146.

(o) 2 K. & J. 509; 5 W. R. 95.

(p) 7 Ell. & Bl. 84.

(q) 1 A. & E. 40.

much contested by the parties who were entitled to the estate of Julia Lyddon in remainder, after his decease, but ultimately, as it is stated, by consent, a decree was made in the suit in the year 1841, by which, amongst other things, inquiries were directed whether the plaintiff Mrs. Lyddon was a creditor on the estate of

Julia Lyddon in respect of the brick debt, and bill debt, respectively ; and, if it should be so found, accounts were * to be taken of what was due in respect of those debts ; and the costs of all parties were ordered to be taxed as between solicitor and client, and paid by the trustees of Julia Lyddon's estates, out of any moneys which should come to their hands, without prejudice to the question how they should ultimately be borne.

In the month of January, 1843, William Lyddon died, having by his will appointed Dr. Simpson and Mr. Bruce to be trustees, and the plaintiff executrix. The plaintiff, having become his representative, revived the suit, and the defendant John Moss became and acted as her solicitor in the conduct of the revived suit. In August, 1843, the defendant John Moss received 1796*l.* on account of the costs of the plaintiff, and of some of the defendants, for whom he was also concerned, taxed under the decree, leaving 559*l.* due to him for the balance of the taxed costs, which he afterwards received in the month of June, 1847. In the year 1844, Mr. Parkyn, one of the defendants in the above suit, who was principally interested in opposing the plaintiff's claims, changed his solicitors, and thereupon his new solicitors, Messrs. Richardson and Smith, opened negotiations for a compromise. On the 16th of October, 1844, a meeting of the parties accordingly took place at the house of Sir Henry Every, where the plaintiff was then staying. There were present at this meeting the plaintiff and Dr. Simpson, the defendant John Moss, and Mr. Smith, of the firm of Richardson & Smith, and it appears that 2100*l.* was then offered by Mr. Smith, on the part of the defendant Parkyn, for the compromise of all the plaintiff's claims, being, as appears, 1500*l.* for the brick debt, and 600*l.* in satisfaction of all other claims, including any arrears due to the estate of William Lyddon in respect of his life interest.

* 111 * This offer, however, was not accepted, and on the 17th of October, 1844, the defendant John Moss, on the part of the plaintiff, and Mr. Smith on the part of the opposing

defendants, came to the following agreement. It is in the shape of a letter from Richardson & Smith to Mr. Moss. [His Lordship read it as set out, *ante*, p. 105.]

It appears by the answer and affidavits of the defendant John Moss, and there is independent evidence which tends to confirm the statement, that he had agreed with William Lyddon that he should be entitled to charge for his professional services upon the principle of his accounts being paid once in every year, as he explains it by the answer and affidavit, as if he had actually received the amount due in each year, the amount then due carrying interest at the rate of 5*l.* per cent per annum, payable yearly, and his disbursements in his account carrying interest in like manner. It further appears by the same answer and affidavits, that the defendant John Moss made advances to William Lyddon, upon the like terms as to interest, and that pending the negotiations between the defendant John Moss and Mr. Smith, a rough calculation was made by the defendant John Moss's clerk, of the amount which was due to the defendant John Moss for extra costs, not included in the taxation, and in part not relating to the suit, and for the advances, and for interest on the costs and advances, computed upon the above footing, and that upon this calculation the amount due to the defendant Mr. Moss was found to exceed 3000*l.*; and it is stated by the defendant John Moss, in the answer and affidavit, and not denied, that the 3000*l.* mentioned in the agreement was allowed by Mr. Smith for the express purpose of meeting what was so due to the defendant Moss, and of being assigned to him by the plaintiff in satisfaction of * what was so due; the defendant Mr. Moss repre- * 112

senting that his object in this part of the arrangement was not only to secure the payment of what was due to him, but to relieve the plaintiff from liability in respect of it, and that Mr. Smith's inducement to consent to this term of the arrangement was, to obtain for his clients the conduct of the suit, and the immediate possession of the papers which he, the defendant John Moss, would not otherwise have given up. The defendant John Moss, by his answer and affidavits, also represents the plaintiff's claims as having been incapable of being maintained; and he alleged what again is not, I think, denied, that pending the negotiations with Mr. Smith, the plaintiff herself agreed with Parkyn to accept 1000*l.* in satisfaction of these claims,—an

agreement which was superseded by the more advantageous terms of the agreement of the 17th of October, 1844.

On the same 17th of October, 1844, the defendant John Moss, by a letter of that date, communicated to the plaintiff the agreement into which he had entered with Mr. Smith. The letter was in these terms: "My dear Mrs. Lyddon, Dr. Simpson will have informed you of the compromise effected. On calculating my costs (which the decree in the suit did not provide), — the interest on my costs, as if my bills had been paid once every year (without which a chancery suit to a country solicitor would be an annual loss), and the money advanced to Mr. Lyddon, and not repaid, — with interest on the advances, they were found to amount to upwards of 3000*l.*, and, therefore, as the only way of exonerating you from all these, Mr. Smith, after considerable contention, agrees to allow 3000*l.*, on account of the promissory note, part of the claims" (that is the bill debt) "which is to be assigned to me; and I shall release you from all liability to

myself in respect of Mr. Lyddon's affairs, and entrust
 * 113 * the future conduct of the cause to Mr. Smith, my agents retiring from it, and myself affording such assistance as may be necessary. Your settlement money of 1500*l.* is to be admitted, when interest at 4*l.* per cent will commence, and you are to retain such rights as you now have to the surplus rents during the life of Mr. Lyddon, from which you will, I have no doubt, realize a very much larger sum than will pay off your advances to him and any other claims by his private creditors. I have written this explanation that no misconception may arise, and will see you at Eggington (that is Sir Henry Every's) on Saturday morning for your signature to a document I shall in the mean time prepare, to secure myself, in order that not an hour may be lost in delivering over the necessary papers to Mr. Smith, getting your claims, as agreed, admitted upon the proceedings, and winding up the suit."

On the 19th of October, 1844, the defendant John Moss accordingly went over to Sir Henry Every's, and procured the plaintiff's execution of the deed. It was made between Mrs. Lyddon of the one part, and Mr. Moss of the other part. It recited the title of William Lyddon, under the will of his first wife, and it recited the settlement made on the marriage with the present plaintiff. It further recited that since the execution of

the said recited marriage settlement, suits had been instituted in chancery relating to the said real and personal estate, moneys and property of the said Julia Lyddon deceased, and that a decree had been obtained bearing date on or about the 22d day of December, 1841, in favour of the said William Lyddon. Then it recited the will of William Lyddon, the codicil to that will, and his death. There were then the following recitals: "Whereas the said William Lyddon was at the time of his decease indebted to the said John Moss in respect of divers sums of money
* advanced and lent by him to the said William Lyddon, * 114
and also for costs, charges, expenses, and disbursements incurred and made by the said John Moss on his behalf as a solicitor as well in a certain cause then and now depending in the Court of Chancery in which the said William Lyddon was plaintiff, and Joseph Woolcock and others were defendants, entitled *Lyddon v. Woolcock*, as otherwise in reference to the affairs of the said William Lyddon, and also for interest agreed to be allowed to the said John Moss; and the said Eliza Sophia Lewis Lyddon, as the representative of the said William Lyddon deceased, is also indebted to the said John Moss for costs, charges, expenses, and disbursements incurred and made since the decease of the said William Lyddon in the said cause, and otherwise in reference to his affairs, and also for interest agreed to be allowed to the said John Moss; which said sums of money, costs, charges, expenses, disbursements, and interest so due and owing from the said William Lyddon deceased, and from the said Eliza Sophia Lewis Lyddon as his representative (exclusively of the costs, charges, expenses, and disbursements which have or may hereafter be allowed in the said cause of *Lyddon v. Woolcock* or any other cause connected therewith), have been estimated upon fair allowances to exceed the sum of 3000*l*. And whereas terms of compromise of the claims of the said Eliza Sophia Lewis Lyddon as the representative of the said William Lyddon deceased, and of herself under her marriage settlement hereinbefore recited, and for the settlement of the said suit, have been agreed upon; and amongst other things it was agreed that the said Eliza Sophia Lewis Lyddon should be allowed to maintain in the Master's office her claim for the sum of 1500*l*. in respect of the brick debt referred to in the said decree, and also to maintain in the Master's office her claim for the sum of 3000*l*. in respect of the bills, bonds, notes,

* 115 or other * securities and debts also referred to in the said decree, and all other her claims as such representative upon the estate of the said Julia Lyddon deceased in any respect whatever, except such arrears of rent and accumulations thereof as the said William Lyddon deceased claimed to be entitled to as tenant for life from her death until his own decease, all right to which, if any, the said Eliza Sophia Lewis Lyddon, as his representative, claimed to be entitled to and intended to reserve; it being distinctly understood that the question as to the fund which should bear the costs already taxed and alluded to in the said decree should remain open and in its then shape in all respects; and whereas by the professional exertions and outlay of money by the said John Moss for many years past the said suit hath been carried on for the benefit of the said William Lyddon deceased and Eliza Sophia Lewis Lyddon, and in order to effect the said compromise the said John Moss hath consented that the future conduct of the said suit should be withdrawn from his agents in London and placed in the hands of Messrs. Richardson and Smith, the solicitors of Frederick Silly Parkyn and others, defendants in the said suit, without the previous payment of the claims of the said John Moss; and it hath been agreed that the said John Moss should accept such assignment as hereinafter contained in discharge of all the said claims of the said John Moss, exclusively of the said costs, charges, expenses, and disbursements which have or may hereafter be allowed in the said cause of *Lyddon v. Woolcock*."

And then by the witnessing part the plaintiff purported to assign this sum of 3000*l.* to Mr. Moss absolutely in discharge of his claim, the consideration being the 3000*l.* alleged to be due to Mr.

Moss in respect of the extra costs and charges.

* 116 * It is plain from the evidence that the plaintiff objected very strongly to this deed, and for some time refused to execute it, — as she states by her affidavit, on the ground of no account having been rendered to her, but, as the defendant Mr. Moss states, because she required a fixed sum for the arrears due to her husband's estate in respect of his life interest, — and insisted on the defendant Mr. Moss becoming the purchaser of those arrears, which he was unwilling to do. It seems probable upon the evidence that this latter ground was insisted upon by the plaintiff, for it is not denied that the defendant was unwilling to

purchase the arrears, and yet it appears that on this 19th of October, 1844, an agreement for the purchase of them by the defendant Moss at the sum of 600*l.* was entered into by him ; ultimately, however, on the 19th October, 1844, the plaintiff executed this deed, but she executed it without any account having been rendered to her, and without any independent advice. The plaintiff's execution of the deed was immediately communicated by the defendant John Moss to Messrs. Richardson and Smith, who thereupon on the 24th of October, 1844, obtained the papers in the suit from the defendant John Moss's agents ; and on the 5th of November, 1844, Messrs. Richardson and Smith were duly substituted as the plaintiff's solicitors upon the record. Whether the plaintiff had or had not in the first instance refused to execute the deed on the ground of no account having been rendered, she was certainly dissatisfied with there having been no such account, for very soon after the deed had been executed, she required to be furnished with accounts. In a letter of Sir Henry Every's to the defendant John Moss of the 24th of October, 1844, he says : " Mrs. Lyddon has seen your letter just come to hand, and says all she requires is a clear account between you, having a notion that there is a mistake about 3000*l.*, &c. I hope, however, the matter will have a satisfactory *termination. * 117 Please to give a day or two notice when convenient for you to be here, any morning about ten o'clock."

The plaintiff, it appears, at this time was in communication with Mr. Bruce, who was one of the trustees of her husband's will. He had been a solicitor, but had retired from that branch of the profession, and had been called to the bar. It is satisfactory to state that his conduct throughout the business seems to me to have been, in every respect, honourable, judicious, and creditable to him. On the 30th of October, 1844, he wrote to the plaintiff as follows : " I am favoured with your letter of the 23d instant announcing the termination of the chancery proceedings, which, under any circumstances, would be a subject of congratulation." " It certainly does appear that the arrangement was completed with some degree of precipitancy, as it is hardly probable that in a matter of such importance, a delay of a few days could have been objected to by the other party. The business is, however, concluded, and I heartily congratulate you that it is so. With respect to Mr. Moss's costs, the amount is,

no doubt, correctly stated ; at the same time you have a right, both legally and in fairness, to a statement of them in detail, and in your case I should certainly require it, as it is by no means impossible or even improbable, that, in the hurry of the negotiation, errors of calculation may have been made. I feel bound to add also that I do not think Mr. Moss ought to require the extent of interest on his costs which he mentions in his letter, viz., interest as if the bills had been paid once every year. This, I believe to be unusual, at least I never heard of such an allowance. It is quite true that a chancery suit to a country solicitor is extremely burthensome and even oppressive without payments

being received on account, as he is obliged to pay to his
* 118 London * agents yearly the amount of their charges, and to find money for all disbursements. A claim for interest is, therefore, to a certain extent, perfectly reasonable. I think Mr. Moss may fairly ask for interest to be calculated from the end of each year at four per cent upon the payments actually made by him to his agents or otherwise, but not upon any portion of his profit upon his bills, as the amount of costs charged may be considered as sufficient compensation for that ; and I consider the interest should be calculated on the principle of simple, and not compound, interest. In giving this opinion, I am taking what I consider the liberal course, as in strictness no interest whatever would be allowed. I have little doubt that Mr. Moss will readily accede to any request you may make to him to the above effect."

On the 4th of November, 1844, the plaintiff forwarded this letter to the defendant John Moss. It appears, I think, from the correspondence, that the defendant John Moss was not, in the first instance, inclined to furnish any account. I infer this from his letter of the 16th November, 1844 ; but afterwards, on the 4th December, 1844, he sent to Sir Henry Every some short summaries of accounts, by which it was made to appear that, taking the interest into account, upwards of 3800*l.* was due to him at the date of the compromise agreement. These summaries were inclosed in a letter to Sir Henry Every, of the 4th December, in these terms (I need not read the earlier parts of it) : " It has been my most anxious wish that Mrs. Lyddon should, before she concludes the sale of the arrears, have the opinion of some other professional man, both in reference to my accounts and the propriety of that sale " (that refers to the agreement for the sale of

arrears which had been made on the 19th of October). "In order to effect (as so much desired by Mrs. Lyddon) a compromise before Mr. Morgan Smith * should leave * 119 Derby, it was only possible to make a hasty calculation of what would cover my claims, including interest; but a very hasty calculation enabled me to ascertain that 3000*l.*, beyond what had been or might be allowed on taxation of costs in the suit, would not be sufficient: but so anxious was I to comply with Mrs. Lyddon's desire for a compromise, and at the same time rid myself of suspicion, that I should retard it for my own benefit, that I at once threw off some hundreds of pounds which that very hasty calculation showed I ought to receive. The delay in my being sent for again to Eggington has enabled my clerk to go over all the accounts in much more minute detail, and he has drawn out short summaries, and I now enclose copies of them with copies of previous accounts." Then he says that his clerk has been occupied several weeks; and he adds, "It will be seen from the summaries that, even with this moderated, after allowing interest, how far the amount I have already received and may hereafter receive (with the 3000*l.*) is below fair professional remuneration for the mental and manual labour of myself and clerks during a period of upwards of thirteen years, besides having risked so large an amount of capital, &c., the return of which depended on my bringing the suit to a successful termination." He afterwards says, "Some further calculations would, I believe, show that, in fact, I shall not be more than about reimbursed on the principle of Mr. Bruce's letter;" that is, in fact, allowing interest on the actual outlay. Then he says, "Mrs. Lyddon will one day or other regret the injurious suspicions she has entertained. If she be still quite determined not to require the advice and presence of a respectable solicitor, but is, at length, satisfied with the arrangement about the 3000*l.*, or merely wants a further explanation as to details, and still insists on my purchasing the arrears of life income for the 600*l.*, I will, on hearing from you in * a post or two to that * 120 effect, arrange for coming over to Eggington either this day (Wednesday), or to-morrow (Thursday) week, whichever may suit you and Mrs. Lyddon best, with the requisite documents, and pay the purchase-money. If Mrs. Lyddon should suppose there is any mistake in the accounts of advances to her-

self and Mr. Lyddon, or of the payments back again, I should be obliged by her pointing them out a few days before I come over, that I may be able to bring with me the necessary vouchers or further information."

It is due to the defendant John Moss to state, that nothing could be more proper than the suggestion made by this letter that the plaintiff should obtain the opinion of a professional man upon the sale and upon his accounts; but the plaintiff, it appears, did not adopt the suggestion. She chose (as appears by her letter of the 27th December, 1844, which is contained in one of the affidavits filed by Mr. Moss) to rely upon Dr. Simpson and Mr. Bruce, and accordingly, on the 19th December, 1844, without any further investigation of the accounts or inquiry into the sale, she executed an assignment of the arrears of the life interest to the defendant John Moss in consideration of 600*l*.

That is a deed reciting all the matters in the previous deed. It recites the terms of the compromise, and it recites the deed of the 19th of October. It recites, "and whereas the said Eliza Sophia Lyddon has contracted with the said John Moss for the absolute sale to him of all such arrears of rent, income, and accumulations thereof as the said William Lyddon deceased was entitled to as tenant for life or otherwise in the estates of the said Julia Lyddon deceased from her death until his own decease, and all other the

interest of the said Eliza Sophia Lewis Lyddon under the
 * 121 will of the said William * Lyddon deceased, or as his representative therein, and other the interest, sum, and sums of money and premises hereinafter more particularly mentioned and intended to be hereby assigned, at or for the price of 600*l*." Then there follows an assignment, in consideration of the sum of 600*l*., of these arrears of rent. At the same date there was a receipt also for it.

Some memoranda were at the same time signed. It appears that Mr. Lyddon had borrowed some trust moneys which had belonged to the settlement of Mrs. Lyddon to the amount of 600*l*., and the sum of 600*l*., which was received by Mrs. Lyddon as the consideration for the arrears, went in satisfaction for this sum of 600*l*. which was due from Mr. Lyddon's estate to the trustees of the settlement on the marriage in respect of moneys which he had borrowed, and the following memorandum was signed by Mrs. Lyddon: "Memorandum. That we, the under-

signed, do hereby declare that the contract entered into by Mrs. Lyddon and Mr. Moss, and the assignment this day executed by her for the sale to him of all such arrears of rent, income, and accumulations thereof, as her late husband William Lyddon, Esq., deceased, was entitled to, as tenant for life or otherwise, in the estates of his first wife from her death until his own decease, and all other the interest of the said Mrs. Lyddon under the will of the said William Lyddon deceased, or as the representative therein, and other the interest, sum and sums of money and other the premises particularly mentioned in the said assignment, for the sum of 600*l*. (this day paid to Mrs. Lyddon), were respectively signed and executed at the special instance and request of Mrs. Lyddon, and with full knowledge on her part of her rights and remedies in respect of the said arrears of rents and premises so assigned. * And after Mrs. Lyddon having * 122 had upwards of two months' consideration, she has insisted on Mr. Moss becoming such purchaser, notwithstanding his repeatedly expressed desire to the contrary. And we make this statement to satisfy Mr. Moss that no imputation can hereafter rest upon his honour by reason of his having become such purchaser." That is a memorandum which on the 19th December, 1844, the day of the execution of the deed of assignment, was signed by Mrs. Lyddon, by Sir Henry Every and by Dr. Simpson, one of the trustees of Mr. Lyddon's will.

Then there is a memorandum of agreement which was entered into with respect of the 600*l*. going in discharge of what was due to the trustees of the settlement. That is also of the same date. Some further summaries of accounts were, on the occasion of the execution of those instruments of the 19th December, 1844, produced by the defendant John Moss; and the plaintiff then requested to be furnished with copies of them. They were accordingly furnished to her on the 23d December, 1844, and she forwarded them to Mr. Bruce.

A long correspondence then ensued between the defendant John Moss and Mr. Bruce. It would occupy too much time to state this correspondence in detail; there are about 200 or 300 brief sheets of it. The effect of it and of all the enormous mass of correspondence before us may, I think, be fairly stated to be this: that the defendant John Moss for some time refused to furnish any detailed bills of costs, but that ultimately, in July, 1845,

he sent to Mr. Bruce the bills in the suit which had been actually taxed, and the drafts of the bills which were untaxed. That Mr. Bruce, after examining the bills and drafts, objected to the charges in September, 1845, and proposed an arrangement * 123 on the footing of a * reduction from the bills, and of a bond of indemnity being given by the defendant Mr. Moss to the plaintiff.

The terms proposed by Mr. Bruce were contained in a letter of 15th September, 1845, from him to the defendant Mr. Moss. He says: "I have gone through the bills. . . . I regret that the result of my examination is not such as it would have afforded me much pleasure to communicate; but I am bound to state candidly the impression on my mind from the inspection, which is, that the scale of charges generally is higher than that usually recognized, or than the circumstances of the case justified. I do not think it necessary or even desirable to enter at large into particulars. With a desire to consider the costs upon a liberal footing, I have made a rough calculation of the deductions I should consider reasonable, and this without proceeding on any thing like a taxation in its ordinary sense. The result at which I have arrived is, that a sum of 800*l.* ought to be deducted. This includes several duplicate charges, and particularly several journeys charged in the bill of costs of the defendants Long, Moss, and Lyddon, which are also included in the taxed bill of the plaintiff's, and also a very considerable portion of the charge for the assignment of the 3000*l.*, which I do not think ought to have been made, at all events in so expensive a form." Then he says, "I have communicated to Mrs. Lyddon the result of the examination, and she has expressed her readiness to be guided by my recommendation. I am induced to suggest the following as the basis of a final arrangement, which must, of course, be considered as in no degree binding on Mrs. Lyddon, in the event of my wishes for an amicable settlement failing of their accomplishment." Then he proposes that 600*l.* should be deducted from the amount of costs as contained in the bills examined by him; that interest should be allowed Mr. Moss on the actual cash * 124 disbursements * on those bills of costs, including, of course, the payment made by agents, but excluding the stationer's charges and so on from the expiration of each current year, as simple interest, at 4*l.* per cent. "That Mrs. Lyddon have credit

for and be entitled to receive any excess beyond the 300*l.* estimated to be received on the further taxation of the costs from the fund in Court. That you enter into a bond to indemnify Mrs. Lyddon against all responsibility she may incur by reason of this arrangement." Then he says, if Mr. Moss will "prefer Mrs. Lyddon's receiving a specific sum out of the 3000*l.* in final discharge of all matters in question, I should recommend Mrs. Lyddon to accept 800*l.* with your indemnity."

It appears that in consequence of this letter of September, 1845, the defendant Moss desired the opportunity of giving personal explanations to Mr. Bruce on the subject of the bills, and refused to agree to the terms proposed without that opportunity being afforded to him; that Mr. Bruce at that time declined to receive the personal explanations, and in December, 1845, peremptorily insisted that his proposed terms should be acceded to, and also that the arrears should be reassigned, and threatened proceedings to set aside the securities and tax the bills if his demands were not complied with, and that the defendant John Moss then offered to reassign the arrears, but refused any further compliance with Mr. Bruce's demands, and threatened proceedings on his part to enforce the securities.

It further appears that whilst this correspondence was going on, the plaintiff had opened a communication with Mr. Smith, of the firm of Messrs. Richardson & Smith, in which she had complained to him of the defendant John Moss's conduct towards her, and had sought and obtained his advice as to her rights and remedies. In * two letters of Mr. Smith, dated * 125 November, 1845, I find him advising the plaintiff to wait till the money should become payable before bringing forward her claims against the defendant John Moss.

In November or December, however, matters appear to have been brought to a crisis by the defendant Moss carrying in a claim against the estate of Julia Lyddon for 3000*l.*, in respect of the arrears of the life interest, and by Mr. Smith refusing to proceed with the suit until that claim was set at rest, and threatening proceedings to set aside the compromise altogether. This state of circumstances led to Mr. Bruce (who, until shortly before that time, does not appear to have been in communication with Mr. Smith) making the peremptory requisition upon the defendant Mr. Moss, to which I have before referred, and which

seems to have been made by him in concurrence with Mr. Smith.

It appears, however, that this requisition failed in effect, and that it having failed, Mr. Bruce (acting, I presume, on the defendant Moss's willingness to reassign the arrears) endeavoured to effect an arrangement with Mr. Smith respecting them, but was unable to do so, Mr. Smith expressing his determination to oppose the claim for arrears, and continuing to threaten proceedings to open the whole compromise. That this led Mr. Bruce, at length, in a letter to the defendant Mr. Moss, dated 9th April, 1846, withdrawing all objection to the assignment of the arrears, reserving, however, the other objections; but that the defendant Moss, in his answer to that letter, dated the 14th of April, 1846, insisted that the waiver as to the arrears was a waiver as to the

3000*l.* also. That in the mean time, the defendant Mr. Moss * 126 had several times pressed for the opportunity of * giving personal explanation to Mr. Bruce on the subject of the costs; and that on the 21st of April, 1846, that opportunity was afforded by Mr. Bruce. The defendant Mr. Moss states in his first affidavit what passed on this occasion, and it is to the effect that Mr. Bruce was satisfied on the subject of the charges.

From this time it does not appear that any further objections were raised by Mr. Bruce to the defendant Moss's demands. Mr. Bruce seems, after this time, to have limited his claim to the indemnity merely; but the defendant Mr. Moss having refused to give the indemnity, Mr. Bruce wrote to him on the 22d of July, 1846, to the effect that the plaintiff had determined to remain passive until the period should arrive for deciding, meaning, of course, until the money should become payable. After this time the correspondence between Mr. Bruce and the defendant Moss appears to have dropped, except that there were some few letters between them, extending to February, 1847, in which the defendant pressed the withdrawal of the claim for indemnity, and threatened hostile proceedings if it was not withdrawn; but Mr. Bruce, on the other hand, persisted in his refusal to withdraw it, and declined to abandon the claim to the 3000*l.* on the part of the plaintiff, unless she was protected by the indemnity.

From this time up to February, 1851, I find no further correspondence, or, at all events, none which is material to the question before us; but in the first affidavit of Mr. Moss (there having

been no correspondence after February, 1851), I find this passage: "As well before as ever after the 27th April, 1846, I protested against the opening of the transaction connected with the aforesaid compromise, so far as regarded the said *deed of the 19th October, 1844; and subsequently to *127 the said 27th April, 1846 (no proceeding having been taken to set aside the said deed until the filing of plaintiff's said bill of complaint), the plaintiff declared her unqualified acquiescence in the same deed, and resumed those terms of acquaintance and friendship with me which had previously existed, and which had been for a time suspended."

It appears from the evidence that after April, 1846, the plaintiff paid one, if not two, visits at the house of the defendant. In February, 1851, she wrote to the defendant, proposing to repurchase the arrears, and the defendant Mr. Moss agreed to procure a retransfer of them. He had assigned them and also the 3000*l.*, in the year 1845, to his two sisters. The plaintiff employed a separate solicitor, Mr. Richardson (not the partner in the firm of Richardson & Smith, but the family solicitor of Sir Henry Every), on the occasion of this repurchase.

On the 11th of April, 1851, the abstract of title to the arrears was forwarded to Mr. Richardson, with a letter from the defendant Moss, in these terms: "The money to be received will be 600*l.* (that is, the amount of purchase-money for the arrears), paid to Mrs. Lyddon. In preparing the assignment, you will please bear in mind that it is simply to reinstate Mrs. Lyddon in precisely the same situation in which she stood as the executrix and legatee of her late husband's will, when she assigned such arrears to me, and without prejudice to the 3000*l.* and interest, which had been previously assigned to me for advances and costs, according to an arrangement made on compromising the suit of *Lyddon v. Woolcock*, under which compromise I agreed to accept that sum in discharge, though far short of what it should have been; *and that Sir Henry Every and myself are to be indemni- *128 fied and relieved from all claims by Mrs. Lyddon, except in respect of my portion of a sum of 1500*l.* and interest she has to receive upon such compromise, or of such arrears as may have to pass through our hands as her trustees. Having, as I shall abundantly satisfy you, been compelled by Mrs. Lyddon, very much against my own inclination, to become the purchaser of the

arrears, of course all professional charges, both of you and myself, attending the reassignment, will have to be borne by that lady; and I mention this, that as little trouble may be given to either of us as possible, as I should regret to see her put to any expense that could, with propriety, be avoided." Then on the 30th of May, 1851, the reassignment was executed.

It is stated by the affidavit of Mr. Moss, and not denied, with respect to the occasion of the execution of the reassignment of the arrears by Mr. Moss to the plaintiff, as follows: "The plaintiff was herself present with her solicitor, the said John Richardson, at the time of settling the transaction, when, on their appealing to me for a reduction of interest, I consented to make a considerable reduction, and received the purchase-money, with the reduced interest and expenses; on my doing which, John Richardson declared I had acted very handsomely, or used words to that effect. If the said plaintiff or her professional advisers had done or said any thing since the said William Adair Bruce had investigated the circumstances as herein, and in my said answer and former affidavit doth appear, until the period of such settlement of the repurchase of the said arrears, to lead me to suppose that any attempt would be made by or on behalf of the said plaintiff to disturb the assignment of the 19th of October, 1844, of the said sum of 3000*l.*, I should not have made such reduction, but * 129 have * insisted on the full amount of such purchase-money, interest, and expenses being paid by the plaintiff before the reassignment to her of the said arrears."

I find, too, that in this deed of reassignment, there is a recital which appears to me to be of considerable importance, bearing in mind that the assignment to Mr. Moss's sisters had included the 3000*l.* There is this recital in the deed of reassignment: "And whereas the hereinbefore recited indenture of the 13th of December, 1845" (that is the sister's assignment), "relates as well to the premises hereby assigned (that is the arrears of the life interest), as to certain other property belonging to the said Mary Moss and Ann Moss." So that it is a recital that the other property comprised in the deed of 1835, and the assignment to the sisters did belong to Mary Moss and to Ann Moss.

Now Mr. Richardson must, of course, have seen that assignment. He was taking the reassignment of that very fund, and he must have known that it included the 3000*l.*, which is the

subject of the present dispute. Besides, the fact of its being so included must be taken to have been known to the plaintiff, as it is mentioned in one of the defendant Moss's letters to Mr. Bruce, — the letter of the 20th December, 1848.

From the date of this reassignment until the filing of this bill nothing material appears to have occurred; but pending this suit the plaintiff appears to have received out of Court what was coming in respect of the 1500*l*. This bill was filed on the 2d of November, 1852, for the purpose of setting aside the assignment of the 19th of October, 1844, and procuring the taxation of the bills of costs; and, by the decree dated the 2d of June, 1858, the Master of the Rolls has set aside the assignment,

* and declared the rights of the parties according to his * 130

- Honor's view of the case. The case comes before us upon appeal by the defendant, from the whole of that decree. It will be convenient to deal with it as we have dealt with the last case, *Gresley v. Mousley*, (a) by considering, first, — whether the deed which is sought to be impeached, could be supported without reference to time and conduct; and, secondly, whether, having regard to time and conduct, the deed can now be impeached.

In considering the first question I desire, in the first place, to absolve the defendant John Moss from any imputation of dishonesty. Having very carefully examined and considered this case, I am satisfied that there was no dishonest intention on the part of the defendant. His error, I think, — for I am by no means disposed to acquit him of error, and of very serious error, in this transaction, — has been that he has treated his client as too implicitly bound to follow his advice, and that he has attached too much value to his own services. With these remarks I leave the question of personal conduct. I am not satisfied with the conduct of the defendant, but I believe it not to have resulted from dishonest motives. I am very clearly of opinion, that if the consideration of time and conduct be laid out of the case, this deed could not for one moment be supported in this Court.

In the first place it is founded upon, and gives effect to, an agreement by a client, to allow his solicitor interest, and even compound interest, upon his bills of costs. Every such agreement is a bargain between the solicitor and the client, and can be

(a) *Ante*, p. 78.

supported only under the same circumstances as would support any other bargain between them. It is the bounden duty of a solicitor, before he enters into any such bargain with his client,

to inform the client that the law allows of no such charge
 * 131 * of interest, and that although he may decline to conduct the client's business without such an allowance, others, of equal ability, may be found who will conduct it upon the scale of allowances which is sanctioned by the law. There is here no evidence of any such information having been given, nor can I find any thing which could warrant an agreement for the charge of interest. The business, so far as it was not connected with the suit, seems to have been the ordinary business of every solicitor; and so far as the suit is concerned, the position of the defendant does not seem to me to have differed from that of every other country solicitor employed in a heavy chancery suit. To hold that this agreement for interest standing by itself could be maintained, would, as it seems to me, be to hold that every solicitor may, at his own will, charge his client with interest, which would lead to intolerable injustice and oppression. Mr. Moss, I observe in one of his letters, argues against the injustice of solicitors not being allowed to charge interest on their bills of costs. If there be such injustice, the remedy must be sought from the legislature, and not from this Court. The case of *Moss v. Bainbrigge*, on which the defendant relied, was far too special in its circumstances to afford any authority in the present case. Amongst other distinctions between that case and the present, the agreement for interest in that case was not originally entered into with the solicitor, but with the brother of the defendant Bainbrigge.

In the second place, this compromise agreement was entered into without any sufficient previous authority from the plaintiff, and, without reference to the effect of time and conduct, was not sanctioned by her otherwise than as she sanctioned it by the execution of the deed in question; and, whatever may be the powers of solicitors to bind their clients by compromise, I
 * 132 am of opinion that * it was not competent to the defendant, without express authority from the plaintiff, to bind her by such an agreement as this, which is, to a great extent, for his own benefit, and by the effect of which the plaintiff's business was, without her sanction, handed over to a new solicitor.

In the third place, the plaintiff's execution of this deed was

obtained with such precipitancy, and under such circumstances, as, in my opinion, to render her execution of it of no avail whatever against her in this Court. The evidence, as it seems to me, wholly fails to make out a case which could justify the peremptory mode in which the plaintiff's execution of the deed was insisted on, or could require the urgent despatch relied upon as the ground of her execution having been so insisted upon.

Upon these grounds, and upon the ground of no account having been rendered and no independent advice having been obtained, I am very clearly of opinion that, without reference to time and conduct, this deed could not possibly be maintained. This case, therefore, like the last, resolves itself into a question of the effect of time and conduct, and, with all deference to the Master of the Rolls, and, I may add, with a very strong disposition to support this decree and set aside this deed, I feel myself compelled to say that, in my judgment, this plaintiff has precluded herself from relief.

The relation of solicitor and client, between her and the defendant Moss, ceased, at the latest, in the year 1845, for all purposes which could influence the determination of this case. Before and after that time the plaintiff had the advice and assistance of Mr. Bruce, who was fully competent to advise her; and, as I have already said, did advise her, in my opinion, most fairly * and judiciously as to her rights. In and before * 133 the year 1845 she was fully aware of the nature and extent of those rights, and, so far from having taken any steps to assert them, she affirmed the transaction in part by withdrawing all objection to the assignment of the arrears. I much doubt whether she was entitled to do this, and whether this affirmance of part of the transaction was not an affirmance of the whole, as the defendant contended that it was; but it would, I think, be going too far to hold the plaintiff to have been irrevocably bound by that act, which certainly was not intended to have such an operation. I find the plaintiff, however, after that time, reconciled to the defendant; visiting him on terms of intimacy and friendship, and ultimately taking a reassignment of the arrears by a deed which recites the very sum in question to be the property of persons claiming under the defendant, and at the time of that reassignment claiming deductions which certainly would not have been made if the claim insisted upon by this bill had then

been advanced. The very act of taking back these arrears without giving notice of the intention to dispute the transaction as to the 3000*l.*, seems to me to have been hardly if at all justifiable. It was undoing the transaction as to what might be beneficial to the defendant, leaving him exposed to the burden of sustaining the rest of the transaction.

Reliance was placed, on the part of the plaintiff, on her having been advised to remain passive until the money should become payable, and it was said that the defendant must be taken to have acquiesced in the question as to the 3000*l.* being thus kept open; but the defendant's conduct must be judged of with reference to the plaintiff's own conduct, and if by her conduct she led him to believe that his claims were not intended to be disputed, he certainly cannot be said to have *acquiesced * 134 in their having been kept open. Again it was said, that it was upon the defendant, and not upon the plaintiff, to proceed; but again, if the plaintiff led him to believe that she did not intend to dispute his claim, there was not any necessity, if there was any ground, for his proceeding.

I do not mean to decide this case upon the ground of time only. I am not satisfied that any analogy from the Statute of Limitations ought to be applied under the circumstances of the case; but I think, taking time and conduct together, the plaintiff has placed difficulties in the way of the Court affording her relief which cannot be surmounted, and I am of opinion, therefore, that this decree must be varied and the bill dismissed, but certainly without costs.

THE LORD JUSTICE KNIGHT BRUCE. — Though I think it plain enough (so plain, indeed, as not to be reasonably disputable) that the plaintiff had originally, and during some years after the year 1844, a case for setting aside the assignment of the 19th October, 1844, which the bill in this case impeaches, I am also of opinion, that before the institution of the suit, which took place not sooner than November, 1852, she had, by her own delay and conduct, — delay and conduct subsequent to her having become in every sense a perfectly free agent and having received competent and independent advice and sufficient information, — lost her title to complain of the deed. Stress ought not, perhaps, to be laid on the death, in 1849, of Mr. Smith; but, considering the

final cessation of confidential and professional relations between the plaintiff and the defendant John Moss, if not in the year 1844, yet certainly before March, 1845; considering the advice and assistance which, between the 19th October, 1844, and * the month of August, 1846, the plaintiff had recourse to * 135 and received, independently of Mr. Moss, and in truth adversely to him, and the knowledge of the circumstances preceding, accompanying, and following the transaction of the 19th October, 1844, which, on her behalf, between that day and the month of August, 1846 (nor alone by means of the bills and draft bills of costs that before August, 1846, Mr. Moss delivered or transmitted), her adviser Mr. William Adair Bruce (a barrister who had been a practising solicitor) acquired; considering the full acquaintance with the plaintiff's rights, which, through Mr. W. A. Bruce, or through him and otherwise, she must, on the evidence, be taken to have obtained before August, 1846; recollecting her course and manner of acting during the whole period that intervened between October, 1844, and November, 1852, especially with respect to the property which, assigned by her in December, 1844, she repurchased in 1851; and remembering, also, that, of the order in *Lyddon v. Woolcock*, dated the 22d December, 1856, and obtained on her petition, she took the benefit (I believe, more than a twelvemonth before the decree now under appeal), and that the present litigation, not concerning land or immovable property, is on a mere money question, I agree with my learned brother that it is right to dismiss the appellant from the suit; but — on account of the professional relation that existed between Mr. Moss and the plaintiff; on account of the ground of dismissal; and on account of the fairly arguable nature, as I conceive, of the question concerning the effect of time and the plaintiff's conduct, which, though decided by us against the plaintiff, was decided in her favour by another Judge of the Court — without costs.

* 136 * ATTORNEY-GENERAL v. DAVEY.

1859. May 2. Before the Lord Chancellor LORD CHELMSFORD and the LORDS JUSTICES.

The decision of the House of Lords in *Attorney-General v. Magdalen College* (6 H. L. Cas. 206), *Held* to govern a case where charity land had not been aliened in fee, but had been held under a lease for 500 years, at a rent which had been regularly paid.¹ The Statute of Limitations was consequently held a bar to a suit instituted after the statutory period to set aside the lease.

THIS was an appeal from the decision of the Master of the Rolls, reported in the 19th volume of Mr. Beavan's Reports, p. 521, setting aside a lease for 500 years of charity lands.

In the year 1509, lands were given by James Wadnow and John Mason to trustees, upon trust, that the churchwardens of the parish of St. Giles, in the city of Norwich, should let the same, and with the rents should repair the parish church, and lay out what should be more than sufficient for that purpose, in support of the common charges of the parishioners, as to the said churchwardens should seem expedient.

By feoffment, dated 12th of May, 1726, the then trustees of the land granted and infeoffed it to Robert Churchman and others, upon trust, that the churchwardens should thenceforth demise and let the aforesaid tenements for such yearly rents as to the churchwardens should seem expedient, and should yearly receive the rents, and apply the same to the repair of the parish church, and the other purposes expressed by the original gift.

On the 14th of September, 1726, by an indenture made between Churchman and the other trustees, and Henry North and Thomas Trule, the then churchwardens of the parish, of the one part, and William Forster, of the other part, reciting, among other things, that the premises, for want of being repaired,
 * 137 were become * decayed and in a very ruinous condition,
 and that the yearly rent thereafter reserved was the best and most improved yearly rent that could be got for them. And

¹ See *Lewin Trusts* (5th Eng. ed.), 638; *Attorney-General v. Payne*, 27 Beav. 168.

reciting, that William Forster was disposed to lay out and expend some considerable sum of money in repairing and rebuilding the premises, and that it was therefore thought necessary to grant him a term of 500 years: It was witnessed, that the trustees and churchwardens demised unto William Forster, his executors, administrators, and assigns, all the premises mentioned in the information, to hold for the term of 500 years, at the rent of 6*l.* per annum, free from taxes, with covenants for repairs, and payment of rent and taxes, and a proviso for re-entry on breach of covenant.

The rent had been paid to the churchwardens from time to time, and applied to the parish purposes, but there were not any trustees of the estate, no successors having been appointed in the place of the trustees who granted the lease. The property had been dealt with by the persons in possession under the lease, and was at the time of filing the information vested in the defendants in different portions, which were of the respective annual values under mentioned, as stated in their several answers, the proportion of the original ground-rent payable to the parish being also stated, namely: —

		Present Annual Value.			Ground Rent.		
		£	s.	d.	£	s.	d.
Defendant	William Davey	12	0	0	0	12	0
,,	Parkinson and his Committee Freeman	27	0	0	1	3	0
,,	Daniel Judson	94	0	0	4	5	0
		133	0	0	6	0	0

* On the 29th of October, 1852, the present information was filed, on the relation of John Godwin Johnson, the sole acting churchwarden of the parish, for the purpose of setting aside the lease. * 138

The defendants, by their answers, stated that they, and those under whom they respectively claimed, had been in possession of the premises since the date of the lease, and submitted that there was no title to relief in equity. They claimed the same benefit as if they had pleaded the Statute of Limitations of the 3 & 4 Will. 4, c. 27.

The Master of the Rolls set aside the lease, and held that the statute did not apply; but, in consequence of the decision of the

House of Lords in *Magdalen College v. The Attorney-General*, (a) overruling a similar decision of his Honor in that case, this appeal was presented by the defendant Parkinson, and was part heard before the Lords Justices on the 17th of February, 1859, when it was adjourned, and ordered to be heard by the full Court of appeal.

Mr. Daniel and *Mr. Speed*, for the appellant, were stopped by the Court, their Lordships desiring, in the first place, to hear the argument on behalf of the respondents, as to the distinction between the present case and *Attorney-General v. Magdalen College*.

Mr. Lloyd and *Mr. Hislop Clarke*, in support of the information. — In *Attorney-General v. Magdalen College*, the defendants had held a fee-simple, without acknowledging * any other title. Here the defendants do not claim to be entitled in fee. They make no claim except under a lease, and if that lease is void, they have no title. No acceptance of rent by the trustees under a lease, constituting a breach of trust, could affirm such a lease. *Bowes v. East London Waterworks Company*. (b) But the payment and acceptance of rent created a tenancy from year to year, which may be now determined. *Doe dem. Martin v. Watts*. (c)

[THE LORD JUSTICE KNIGHT BRUCE. — If there had been a dry term and no rent paid, would not the case have been governed by that of *Magdalen College* ?]

It is not necessary to dispute that proposition, as we submit that the payment of rent constitutes a material distinction. In several cases leases of charity lands have been set aside in which the Statute of Limitations would have been a good defence, if it is a good defence in this case.

The following authorities were also referred to: *Attorney-General v. Pilgrim*, (d) *Attorney-General v. Hungerford*, (e)

(a) 6 H. L. Cas. 189.

(b) Jac. 324.

(c) 7 T. R. 83.

(d) 12 Beav. 57; 2 H. & T. 186.

(e) 8 Bligh N. S. 437; 2 Cl. & Fin. 357.

Jones v. Verney, (a) Doe v. Butcher, (b) Attorney-General v. Griffith, (c) Attorney-General v. Foord. (d)

Mr. Daniel and *Mr. Speed* were only called upon to address the Court on the question of costs.

THE LORD CHANCELLOR. — The only question in this case is, whether it is possible to distinguish it from that of *Attorney-General v. * Magdalen College*. Before the decision * 140 of that case by the House of Lords, it was considered that charities were not within the statute, and so the Master of the Rolls held. The House of Lords has decided that by the 24th section of the 3 & 4 Will. 4, c. 27, as interpreted by section 1, churchwardens may be considered as trustees within the 25th section, for the poor, as a “class” of persons falling within the 24th section. But for that decision I confess that I should have been inclined to think that the word “class” was intended to designate a body of ascertained and defined persons, and not a fluctuating body, such as the poor of a parish. Is there then any distinction between the present case and that of *Magdalen College*? *Mr. Lloyd* says that the lease was void, but that, by the acceptance of rent, a tenancy from year to year had been created. He was pressed to give an authority for the proposition, that possession taken under a lease of this kind has ever been dealt with in equity as a lease from year to year, and he has been unable to produce any such authority. I think that there has been adverse possession, and that the statute would run according to the decision in the House of Lords, by which we are bound.

THE LORD JUSTICE KNIGHT BRUCE. — If this case had arisen before me in 1854, as it did before the Master of the Rolls, I think it likely that upon previous authorities, and upon the Statute 3 & 4 Will. 4, c. 27, I should have arrived at the same conclusion, although there may be something extraordinary and alarming in acting in a suit instituted in 1852, on a state of circumstances which existed as forcibly in 1726, as it does at present, and which has so existed during the whole of the inter-

(a) Willes, 169.

(c) 13 Ves. 565.

(b) Doug. 50.

(d) 6 Beav. 288.

mediate time. In 1857, the decision of the House of Lords,
 * 141 in * the case of Magdalen College, was made, and the ques-
 tion is, whether that decision is not in spirit applicable
 here. Notwithstanding the plausible and able argument of *Mr.*
Lloyd, I cannot distinguish the present in spirit from that case.

THE LORD JUSTICE TURNER. — I cannot distinguish this case
 from that of Magdalen College.

Information dismissed. No costs.

WRIGHT v. WILKIN.

1859. May 3. Before the Lord Chancellor LORD CHELMSFORD and the
 LORDS JUSTICES.

Where an heir-at-law filed a bill to set aside, as unduly obtained, a will, pur-
 porting to dispose of real estate, alleging the existence of an outstanding
 legal estate, or, in the alternative, to have the benefit of legacies on the
 ground of their being void under the Mortmain Act, but failed to prove
 the existence of any outstanding legal estate, the bill was dismissed (with-
 out prejudice to the right to file another) as to the former alternative for
 want of equity, and as to the latter alternative as being premature;¹ Lord
 Justice KNIGHT BRUCE, who thought that the bill might have been
 retained, to afford an opportunity of trying the question of the validity of
 the will,² not agreeing in the dismissal.

THIS was an appeal from the decree of Vice-Chancellor KINDERS-
 LEY, dismissing with costs the appellant's bill, whereby he sought
 a declaration that a will was void as regarded the testatrix's real
 estate, or, in the event of the Court holding the will executed,
 then for a declaration that certain charitable legacies were void,
 and that the appellant, as the testatrix's heir-at-law, was entitled
 to the amount so bequeathed.

The bill stated that the testatrix died in the month of Decem-
 ber, 1856, intestate as to her real estate, and without ever
 * 142 having been married; and that on her decease * the plain-

¹ See 1 Dan. Ch. Pr. (4th Am. ed.) 385.

² See *Jones v. Gregory*, 2 De G., J. & S. 83.

tiff, as the heir-at-law and customary heir of the testatrix, became and was entitled to the freehold and copyhold estates of the testatrix.

That the defendant Thomas Martin Wilkin (a solicitor, who for a short time previously to and at the time of the decease of the testatrix acted as her professional and confidential adviser in the management of her affairs) had, since the decease of the testatrix, entered into the possession and receipt of the rents and profits of all the freehold and copyhold estates, claiming to be entitled thereto under or by virtue of a pretended will which he alleged was made and executed by the testatrix in his favour.

The bill set out the alleged will, whereby, after giving legacies of a considerable amount to two of her servants, named Jane Burton and Sarah Burton, and after giving legacies to charities, the testatrix gave to Mr. Wilkin all her real estates, both freehold and copyhold, in Tilney, St. Lawrence Tilney, All Saints, and elsewhere, and all the residue of her estate and effects, upon the express condition that if her personal estate should be insufficient for the purpose he should, within twelve months after her decease, pay and discharge all and every the legacies thereinbefore bequeathed; and she thereby charged all her real and personal estate with the payment of the legacies.

There were codicils to the will, giving further legacies to Jane Burton and Sarah Burton.

The bill further stated that the testatrix was, at the time of her decease, of the age of eighty-five years and upwards, and had been for a considerable time prior to the dates of her pretended will and codicils, and by reason * of her great age * 143 and bodily infirmities, confined to her sleeping-room, and that she had become and was much subject and liable to undue influence, and particularly to the influence of the above-mentioned Jane Burton and Sarah Burton.

That the will and codicils were respectively prepared by the defendant Wilkin, who acted in the preparation thereof as the confidential solicitor and legal adviser of the testatrix, and were respectively in his handwriting or in that of a clerk employed by him; and that the testatrix had no professional advice or assistance, or at least (having regard to the benefits thereby purported to be conferred on the defendant Wilkin) no available advice or assistance in the preparation thereof.

That the plaintiff, as heir of the testatrix, had commenced an action of ejectment for the purpose of recovering possession of the lands alleged to be devised by the pretended will and codicils ; but that there were some old mortgage terms created by former owners of the estates which were still outstanding, and that the estates were subject to some existing tenancies from year to year and other tenancies which were well created by the testatrix, but that the plaintiff could not particularize these terms or tenancies, the documents being in the possession of the defendant Wilkin.

The prayer was for a declaration that the pretended will and codicils, so far as they respectively purported to devise or affect the real estate of the testatrix, were respectively void, and that the defendant Wilkin was, to the extent of his estate and interest, if any, in the real estate, a trustee for the plaintiff, and that (if necessary) an issue might be directed to try the validity

of the pretended will and codicils, and that all proper and
* 144 necessary * directions might be given for that purpose ; that in case the will and codicils respectively should be declared not duly executed by the testatrix, then that the defendant Wilkin might be decreed to deliver up the possession of the freehold and copyhold estate to the plaintiff, and, if necessary, to surrender the copyhold estate to the use of the plaintiff and his heirs, and that an account might be taken of the rents and profits of the estates possessed by Wilkin, and that he might be decreed to pay over to the plaintiff what should be found due from him upon the taking of such account ; or, in case it should appear that the will and codicils, so far as they purported to devise or affect the real estate of the testatrix, were not void, and that the defendant Wilkin was not, to the whole extent of his estate and interest, if any, in the real estate a trustee for the plaintiff, then that it might be declared that the charitable legacies, purported to be bequeathed by the pretended will and codicils, were void in law so far as the same were purported to be charged on such part of the estate of the testatrix as did not, at the time of her decease, consist of pure personal estate ; and that the plaintiff, as such heir-at-law and customary heir of the testatrix, was entitled, as against the defendant Wilkin, to the amount of the several charitable legacies as part of the real estate of the testatrix undisposed of by the will and codicils, by way of resulting trust, or, at least,

to such part of the charitable legacies as upon a due apportionment thereof bore the same ratio to the whole amount of such charitable legacies as the real estate of the testatrix bore to the whole of her pure personal estate.

The bill also sought the usual accounts of the real and personal estate and debts of the testatrix, and, if necessary, the appointment of a receiver, and for an injunction against Wilkin to restrain him from receiving the rents * and profits of the * 145 testatrix's real estate, and from selling and disposing of the same estate, or any part thereof, and from cutting down or felling or otherwise injuring any of the timber or timber-like trees standing on the said lands and premises, and from selling or otherwise disposing of the same, and from committing any other waste, spoil, or destruction on the lands, and from setting up the outstanding terms of years and existing tenancies or interests or other temporary bars as a defence against the plaintiff's proceedings.

The answer denied, and it was not proved, that there was any outstanding legal estate or other impediment to the trial, by an action, of the validity of the will.

Mr. Glasse and *Mr. W. H. Terrell*, for the appellant. — They referred to *Lloyd v. Passingham*, (a) *Scott v. Earl of Shrewsbury*, (b) *Middleton v. Sherburne*, (c) *Boyse v. Rossborough*. (d)

Mr. Baily and *Mr. C. Hall*, for the respondents. — They referred to *Wood v. Rowcliffe*, (e) *Hindson v. Weatherill*, (g) *Thompson v. Judge*. (h)

The Lord Chancellor referred to *Jones v. Jones*. (i)

* The Lord Justice TURNER referred to *Beaumont v. Bramley*. (k) * 146

(a) 16 Ves. 58.

(b) Before Vice-Chancellor WOOD, not reported.

(c) 4 Y. & C. 358.

(h) 2 Drew. 414.

(d) 6 H. L. Cas. 2.

(i) 3 Meriv. 161.

(e) 2 Ph. 382.

(k) Turn. & R. 41.

(g) 5 De G., M. & G. 301.

Mr. Baggallay and Mr. Woodroffe, for other parties.

Mr. Glasse, in reply.

THE LORD CHANCELLOR. — I am of opinion that the proper course in this case is to dismiss the bill with costs, but without prejudice to the right of the plaintiff to file any other bill.

The bill has been filed by the heir-at-law in the first place, praying for an issue to try the validity of the will, and suggesting that there were outstanding terms which formed an impediment to his recovering at law. Now although, in general, an heir-at-law is not entitled to an issue of this kind, it does not follow, when he comes to this Court for the purpose of removing out of his way a legal impediment, that the Court may not, if it considers it the most convenient course for trying the question, direct an issue: indeed, the contrary seems to have been decided in the case of *Boyse v. Rossborough*, (a) in the House of Lords. But in this case it is necessary, before the plaintiff can establish his right to an issue, or to any equitable relief at all, that he should show there was an impediment to his recovering at law. He alleges that there are outstanding terms. It is denied there are any such outstanding terms, and it is now admitted that there is no term whatever in existence which would prevent the plaintiff from proceeding by ejectment, and therefore that ground of relief is completely taken away. That being so, it is quite

* 147 clear * that, having the power in his own hands of proceeding at law, he had no necessity whatever to resort to a Court of Equity for the purpose of impeaching, or having the means of impeaching, the validity of this will.

But he contends that, if the will should be established, he is entitled, as heir-at-law, to certain void legacies, and therefore he claims now to have the bill retained in order that he may have an opportunity, first of trying the question at law, and then, supposing him to be unsuccessful at law, of having the question, as to the legacies, determined here. I think, however, that the plaintiff had no right whatever to raise the latter question prematurely, as he appears to me to have done, by the present bill. I think that he ought first to have proceeded at law and to have tried the question of the validity of the will there, and that he

(a) 6 H. L. Cas. 2.

had no right to come into equity at this stage of the question between him and the other parties.

I think that the bill should be dismissed with costs, but without prejudice to the plaintiff's right to proceed by another bill.

THE LORD JUSTICE TURNER. — I am entirely of the same opinion. There is great inconvenience in bills of this description, and I am by no means inclined to encourage them unless they appear to be well founded. In this case great expense has been incurred in entering into evidence upon the question of the validity or invalidity of a will, — a question upon which this Court, if there be no legal estate outstanding, can give no decision whatever. The fact of the outstanding legal estate shifts the jurisdiction from the Court of Law to this Court; but, in the absence of * that fact, this Court has no jurisdiction to try the * 148 question of the validity or invalidity of a will.

Let us see how this case stands. This is a bill which alleges the title of the plaintiff as heir-at-law, and alleges that he cannot proceed at law to try the validity of the will because there are legal estates outstanding, or outstanding terms, which prevent his recovering at law. He wholly fails in sustaining that allegation, and therefore we must lay it out of the case altogether.

The bill, then, stands in this position. It disputes the validity of this will, but seeks, in the event of the will being established at law, to set up a title which admits its validity, so that, in truth, the bill prematurely asserts a title which assumes the validity of the will, while it, at the same time, alleges that the will is wholly invalid. If the plaintiff succeeds at law, and it is quite open to him now to prosecute his claims there, the question upon the legacies will never arise at all. It appears to me, therefore, that this bill is unfounded and premature, and that it must be dismissed with costs, without prejudice to the plaintiff's right to file another.

I rather think that the principle which was acted upon in the case to which I have referred, of *Beaumont v. Bramley*, (a) applies to the point. In that case a plaintiff came to the Court for the purpose of rectifying a conveyance, alleging that the conveyance passed more than it ought to have done, and Lord ELDON decided that the plaintiff must admit the legal title to be in the

(a) Turn. & R. 41.

defendant, against whom he asserted that equity. I think that if this plaintiff had admitted the will to be valid it would have been quite open to him to file a bill for the purpose of obtaining relief in respect of the charitable legacies ; but that he cannot assert the will to be invalid and at the same time claim to take a benefit on the assumption of its validity.

THE LORD JUSTICE KNIGHT BRUCE. — I agree with the Vice-Chancellor, that in the state in which the case came before him it was not possible for him to grant any relief. I agree also with the Lord Chancellor and the Lord Justice, that in the state in which the cause comes before us it is not possible for us to grant any relief. I concur also with the Lord Chancellor and the Lord Justice in the propriety of adding to the order for the dismissal of the bill, if it is to stand, as it will, a reservation of the right of the plaintiff, barred, perhaps, at present, by the form of the order, to file another bill upon the question of the charitable legacies, — an addition which, it is said, might probably have been obtained, if asked, from the Vice-Chancellor.

I respectfully dissent, however, as to the necessity of dismissing the bill at present ; my impression is, that, consistently with the rules of the Court, with justice, and with convenience, without prejudice to any question of costs or to any other question, the bill might with propriety be retained until the ascertainment of the validity or invalidity of the will. It is impossible, however, not to see that great expense has been incurred in this suit which might have been avoided, and therefore, although, as I said before, I dissent from the course taken, it is impossible for me to feel much regret at it.

* MACLEAN v. DAWSON.

* 150

1859. May 4. Before the LORDS JUSTICES.

The Court has a discretion as to whether it will order service of copy bill out of the jurisdiction, under the 33d Order of May, 1845 (Consol. Ord. 1860, x. 6).

Course to be taken by a defendant who considers that an order for such service upon him ought not to have been made.

M. filed a bill to set aside for fraud a purchase from her by J. D., deceased, of shares in a Scotch trading company. J. D. had died domiciled in Scotland, and leaving no property in England. A., B., and C. were his executors in Scotland, but he had no personal representative according to the law of England. A. and B. were resident in Scotland, C. in England; and some of the shares in question were alleged to be standing in C.'s name: *Held*, by the Lord Justice KNIGHT BRUCE, affirming the decision of the Master of the Rolls, that service upon A. and B. in Scotland ought to be ordered.¹

THIS was an application by William Dawson and Thomas Dawson, to discharge an *ex parte* order of the Master of the Rolls, giving the plaintiffs leave to serve a printed copy of the bill upon them in Scotland, which order his Honor had refused to discharge.

The suit was instituted by Henry Dundas Maclean and Eleanor his wife, against Henry Dawson, William Dawson, and Thomas Dawson, who were the executors of Joseph Dawson, against the executors of Henry Stainton, and against the Carron Company, to set aside for fraud a purchase made by Joseph Dawson in 1839, of ten shares in the company from Mrs. Maclean, as executrix of Sarah Lodge. Joseph Dawson had been the manager, and William Dawson the assistant manager of the company at Carron, near Stirling; Stainton the manager in London. The case made by the bill was that Joseph Dawson, Stainton, and William Dawson had conspired together to publish false accounts of the state of the company's business, for the purpose of depreciating its shares, so that they might buy them at an undervalue, and had by that means so depreciated them that Joseph Dawson was

¹ See *Drummond v. Drummond*, L. R. 2 Ch. Ap. 32.

enabled to purchase the shares in question from Mrs. Maclean at about a third of their real value.

* 151 * Joseph Dawson died in 1850, resident and domiciled in Scotland, having made a trust disposition, by which he gave his residuary estate to the defendants Henry Dawson, William Dawson, and Thomas Dawson, and appointed them his executors. They were duly constituted executors in Scotland, but there was no legal personal representative of Joseph Dawson, according to the law of England. The plaintiffs resided in Cumberland, Henry Dawson at Liverpool, William Dawson at Carron, and Thomas Dawson near Glasgow. The company was a Scotch company, and there was not at the time of the institution of this suit any property of Joseph Dawson in England. It appeared from the statements in the bill that, in 1826, Joseph Dawson had only ten shares in the company, but subsequently purchased seventy-one more, and at his death there were seventy standing in his name. After his death these seventy shares were divided between William Dawson, Henry Dawson, and Thomas Dawson; twenty-four being transferred to William, and twenty-three to each of the others; and when the bill was filed, twenty-three of them were standing in the name of Henry Dawson. Stainton had died domiciled in England, leaving a will, appointing English executors, who proved it in England.

The Master of the Rolls having made an *ex parte* order, under the 33d Order of May, 1845, (a) giving the plaintiffs leave to

* 152 serve William Dawson and Thomas * Dawson in Scotland, and to serve the Carron Company in Scotland, and also at their branch office in London, William Dawson and Thomas Dawson, by leave of the Master of the Rolls, entered a conditional appearance with the registrar, and then moved to discharge the order. This application having been refused by the Master of the Rolls, was now renewed before the Lords Justices. William and Thomas Dawson, shortly after the filing of this bill, instituted in

(a) Where a defendant in any suit is out of the jurisdiction of the Court, the Court, upon application, supported by such evidence as shall satisfy the Court in what place or country such defendant is or may probably be found, may order that the *subpœna* to appear to, or to appear to and answer, the bill, may be served on such defendant, in such place or country, or within such limits as the Court thinks fit to direct.

Scotland a suit of multiple poinding for the administration of Joseph Dawson's estate, and the settlement of all demands against it, and they called as defenders in that suit the present plaintiffs and others.

Mr. Rolt, Mr. Follett, and Mr. Cotton, for the appellants. — The Master of the Rolls treated this as a case in which he had no discretion, but the Court is not bound to give leave to serve a bill out of the jurisdiction; it has a discretion: *Whitmore v. Ryan*; (a) and this discretion ought to be exercised here by refusing leave. In *Innes v. Mitchell*, (b) the judgment proceeded on grounds which are wanting here. Here there are a Scotch company, Scotch executors, and Scotch property: there is no probate in England. A litigation is going on in Scotland, in which all these questions might be settled, and a decree here would be useless, and incapable of being enforced. The subject-matter of the suit is out of the jurisdiction. The alleged fraud, if in fact committed, was committed in Scotland. No probate has been taken out here, nor is there any occasion to take it out, as there is no property here. Even if the executors had been resident in England, it is a question whether litigation on such a matter ought to be allowed *here, the Scotch *153 Courts being the proper tribunals for deciding it. *Innes v. Mitchell* did not decide that, where every element in dispute was foreign, the litigation might at the mere will of the plaintiff be carried on here instead of abroad. In *Whitmore v. Ryan*, the defendant was in England when the bill was filed. In dealing with an application to serve process out of the jurisdiction, it must be considered: 1. Whether the parties are generally resident within the jurisdiction. Suppose two Frenchmen entered in France into a French contract, could one of them come over here and file a bill about it? 2. Where the property to which the suit relates is situate. Here it is all in Scotland. 3. What is the nature of the question to be decided? Here it is a question relating to a contract entered into in Scotland, and capable of being tried there much better than here. 4. By what law the case must be decided. Here it must be decided according to Scotch law. To all this it must be added that there is a suit pending in Scotland in which this question could be tried; and

(a) 4 Hare, 612.

(b) 1 De G. & J. 423.

if the present suit had been instituted in Scotland, it would have been stayed, and the plaintiffs compelled to go in under the multiple poinding suit. If this cause comes to a hearing, it will turn out that it cannot be prosecuted against us here to any purpose. *Elliott v. Lord Minto.* (a) Substantially all the defendants are in Scotland. Henry Dawson is a cipher in the administration of Joseph Dawson's estate; the other two, by Scotch law, forming a quorum, and being resident where the property is. Stainton's executors having proved his will in Scotland, are subject to the jurisdiction of the Scotch Courts. The Carron Company is in Scotland, has no property here, and is merely a formal defendant, for the sake of obtaining an

* 154 order upon it for a transfer * of the shares in its books.

The bill is demurrable for want of an English personal representative of Joseph Dawson, so there is no use in its being served, whereas the proceedings in Scotland are perfectly regular. Supposing this suit to be brought to a hearing, the decree could not be enforced, and the Court will not lend its extraordinary power to enable the plaintiffs to get such a useless decree.

Mr. Roundell Palmer and *Mr. John Pearson*, in support of the order. — There is nothing to show that this suit, if instituted in Scotland, would be stayed. It would be attached to the suit already pending there, but would not be stayed. It is against all principle that a suit to set aside a purchase for fraud should be stayed, because a common suit for administration of the purchaser's estate is pending. The other side say a decree here would not do us any good, but this Court assumes that its decree will be obeyed by the parties, and that if they refuse to do so, the Courts of the country in which they are will treat it as binding their rights. The Court will only look at the question, whether the plaintiff comes with a case which it ought to entertain, and whether the defendant is a necessary party. If these questions are answered in the affirmative, it will compel the defendant to appear. The bill here makes out clearly that the plaintiffs' shares were in Joseph Dawson's possession at his death, according to the principles of attribution in *Pennell v. Deffell.* (b) Of the seventy shares which Joseph Dawson had at his death, twenty-three are standing in the name of H. Dawson, who re-

(a) 6 Madd. 16.

(b) 4 De G., M. & G. 372.

sides in Liverpool. Not one of the arguments of the defendants * applies as regards him, but we could not sue * 155 him alone. Mrs. Maclean lived in England, and the contract was an English contract. The Master of the Rolls thought that it would be very inconvenient, and could not have been the intention of the order, to have every case fully discussed on the merits, before determining whether leave to effect service out of the jurisdiction should be granted. He considered, therefore, and we submit rightly, that the order should be made wherever a plaintiff came with a case not plainly untenable. Justice can be done here better than in Scotland, the machinery of the Scotch Courts for compelling discovery not being nearly so effective as ours. The argument as to the demurrable nature of the bill cannot hold on the present occasion. To allow it would be to let defendants demur for want of parties before appearance. Moreover, we submit, that a curable fault in the bill is not a ground for refusing to compel the defendant to appear. The present case is substantially identical with *Innes v. Mitchell*. In that case the defendants were Scotch, the property Scotch, and a Scotch suit for administration had been got up. There is no analogy in favour of the course taken by the defendants, and the motion, we submit, is irregular.

[THE LORD JUSTICE TURNER. — I think that if a defendant is advised that the discretion which the Court has with respect to service upon him abroad has been unwisely exercised in ordering such service, his proper course is to do what these defendants have done, — enter a conditional appearance with the registrar, and move to discharge the order for service.]

Mr. Rolt, in reply.

THE LORD JUSTICE KNIGHT BRUCE. — The arguments which have been so ably urged in this * case as to the * 156 multiplication of litigation, and as to the supposed unlikelihood of this suit proving to be of any utility to the plaintiffs, are certainly not wholly irrelevant on the present occasion; but even if they are well founded they are not decisive on a motion of this description. The 33d Order of May, 1845, on which the Master of the Rolls proceeded, does not require an affidavit as to

the merits. [His Lordship read the order.] Now I entirely agree with the observation, that a discretion is to be exercised in each case, whether the Court shall act or shall not act under this order ; still it is impossible not to observe that no affidavit or other evidence, as to the truth of the plaintiffs' case, is required. I apprehend, however, that it is incumbent on the Court to look into the bill, though not supported by evidence, for it is easy to conceive the case of a bill so plainly absurd, or relating to such a subject-matter, or to a controversy between persons so circumstanced, that the Court ought at once to decline to act. I do not think this a case of that description. I was struck, during the argument, with the circumstance, that the bill is probably demurrable ; not on the merits of the case, but because it asserts a demand to the discussion of which the presence in some sense of a legal personal representative, constituted according to the law of England, may be requisite, and does not allege or deny (I believe) the existence of such a representative. It must be remembered, however, that such an objection is one an opportunity of removing which, by amendment of the bill, would be given almost as a matter of right. I think, therefore, that the possibly objectionable nature of the bill, in this respect, is not a reason sufficient to prevent the Court from interfering. It is said that the case is such, that, even if an English personal representative were added, no effectual relief could be given, inas-

* 157 much as two of the three executors are resident in * Scotland ; but I am not satisfied of this. Looking at the case with the aid of the evidence added since the order under appeal was made, or looking at it merely as it stood before the Master of the Rolls, though there may be a considerable chance of the plaintiffs' failing to obtain any effective relief, they have, in my judgment, a chance of success. The bill is not, on the face of it, absurd. Looking at the subject-matter of the suit, which relates to movable property, and does not at all relate to immovable property beyond the jurisdiction of the Court ; looking, also, at the fact, that the dispute is not between foreigners, nor between foreigners and subjects of the Queen, but wholly between subjects of the Queen who are resident in this island ; and considering that, if any circumstance should bring these gentlemen to England even for a merely temporary purpose, they might be served in the ordinary way and the suit would proceed, I am of opinion

that, though the plaintiffs may, in proceeding with their suit, be liable to much risk of failure, their case is not so evidently bad as to justify the Court in refusing to allow that service to take place in Scotland which would be clearly good if made here. The appeal motion, in my judgment, must be refused; and, if my learned brother does not object, the costs, both at the Rolls and here, will, as between the plaintiffs and these defendants, be costs in the cause.

THE LORD JUSTICE TURNER.—As my learned brother agrees with the Master of the Rolls in this case it is unnecessary for me to give any opinion upon it; and, regarding it as a question of discretion, I think it right to abstain from doing so. I wish, however, to state distinctly that, in my opinion, the Court has a discretion in these cases, and that I consider it to be the duty of the Court to look into the * bill for the purpose of * 158 satisfying itself how such discretion ought to be exercised.¹ The discretion ought, in my judgment, to be as carefully exercised upon an application to discharge an order allowing service out of the jurisdiction as upon the original application for the order. I agree with my learned brother as to the mode of dealing with the costs.

BURT v. THE BRITISH NATION LIFE ASSURANCE ASSOCIATION.

1859. May 5, 7, 9. Before the LORDS JUSTICES.

Although it may be too strict to hold that a director of a company is bound to look back through the minute-book into entries, made in it before he became a director, yet, where, subsequently to his becoming a director, he is a party to dealings founded on those noticed in such prior entries, and allows his brother directors to act and proceed upon the notion that he affirms and adopts the transactions to which such entries relate, and this course of acting goes on during two years, he is precluded from impeaching such transactions, unless he can establish a case of deception or want of due information.

¹ See 1 Dan. Ch. Pr. (4th Am. ed.) 452.

As, on the one hand, a plaintiff who has a right to complain of an act done to a numerous society of which he is a member, is entitled to sue on behalf of himself and all others similarly interested, though no other may wish to sue; so, on the other hand, although there are a hundred who wish and are entitled to sue, still, if they sue by a plaintiff who is personally precluded from suing, the suit cannot proceed.¹

THIS was an appeal of the plaintiff from the dismissal of his bill by Vice-Chancellor STUART.

The plaintiff sued on behalf of himself and all other the shareholders or proprietors of shares in the British Nation Life Assurance Association, except the defendants; and the case made by the bill was as follows:—

By the deed of settlement of the association, dated the 28th of February, 1855, and expressed to be made between the
 * 159 several persons whose names were or should * be thereunto subscribed, and whose seals were or should be thereunto affixed (except the several persons parties thereto of the second and third parts), of the first part, Edward Baylis and George Bermingham, two of the defendants, Francis Norton Erith, James Furnell, George Charles Richardson, and John Thompson, other defendants, of the second part, and a trustee for the association of the covenants thereafter contained of the third part, the parties of the first and second parts covenanted with the trustee, among other things, as follows:—

(1.) That subject as therein mentioned the parties of the first and second parts, and all other persons who should become members of the association, should be and continue associated together from the date of the deed until the association should be dissolved in manner thereafter provided.

(3.) That the object and business of the association should be to effect assurances upon lives and survivorships, to grant annuities, and to transact the usual business of a life assurance company.

(5.) That the capital of the association should consist of 300,000*l.* divided into 300,000 shares of 1*l.* each, and of such

¹ See 1 Dan. Ch. Pr. (4th Am. ed.) 244, 245; 2 Lindley Partn. (Eng. ed. 1880) 780; Hubbell v. Warren, 8 Allen, 173, 177; Kerr Inj. 549, 550; Sturge v. Eastern Union Railway Co., 7 De G., M. & G. 180, *per* TURNER L. J.

additions thereto (if any) as should be made under the powers thereafter contained.

(7.) That the sum of 1s. per share, part of the sum of 1l. per share, should be paid immediately after the complete registration of the association, and the sum of 19s. per share, the residue of the said sum of 1l. per share, should be paid by instalments in manner thereafter mentioned.

* (10.) That the following persons should be the first * 160 and then present officers of the association, namely: that Edward Baylis, George Bermingham, Francis North Erith, James Furnell, George Charles Richardson, and John Thompson should be the directors, Edward Baylis the consulting actuary, and George Bermingham the consulting surgeon.

(13 & 14.) That an ordinary general meeting should be held on the second Wednesday in February, 1856, the second Wednesday in February in every subsequent year, or on such other days within the limits mentioned in the deed as the directors should appoint.

(199.) That it should be lawful for the board from time to time to come to a resolution that all the proprietors or other holders, for the time being, of shares, should be called upon to pay a further instalment on each of such shares, in addition to the instalment or instalments which might, for the time being, have been previously paid in respect thereof until the full amount of such share should be paid up, fixing such a day for the payment of such further instalment as would allow at least two calendar months' previous notice to be given of the call.

(204.) That on non-payment of the call in two months the board might declare the shares forfeited on which such call should be unpaid.

(270.) That no holder of any share should have power to transfer the same, unless the full amount of the instalments for the time being called for on such share should have been paid.

Previously to the execution of the deed of settlement * an * 161 indenture, dated the 1st of November, 1854, was (according to the statement in the bill) alleged by the defendants to have been made between Edward Baylis, George Bermingham and Francis Norton Erith of the one part, and James Clarke and John Teulon of the other part, whereby Edward Baylis, George

Bermingham, and Francis Norton Erith transferred to James Clarke and John Teulon, as trustees for the company, all their interest in certain leasehold premises, No. 85, Cranbourne Street, and also the copyright of a book on life assurance, prepared by Baylis, Bermingham, and Erith, and the right to adopt the principles therein mentioned upon condition that the association should pay to each of them (Baylis, Bermingham, and Erith) on the complete registration of the association 1000*l.*, and also should, after the expiration of one year from the date of such complete registration, pay to each of them during his life, if the association should so long continue, for his own absolute use and benefit, a percentage or commission, at the rate of 2*l.* per cent per annum, on all premiums paid to or received by or on behalf of the association in respect of life policies, and that Baylis should be the consulting actuary of the association, and should receive in consideration of the value to the association of his great experience and knowledge in connection with life assurance, and as a promoter, an annuity specified in the deed; and that Bermingham should be consulting surgeon of the association, and as such consulting surgeon and as a promoter of the association should receive an annuity of 250*l.*, although he should think fit to resign, or cease to be the consulting surgeon of the association; and, also, that Erith should be the resident manager and actuary of the association, and as such resident manager and actuary should receive a specified salary.

* 162 * The bill, however, stated that no shareholder was a party or in any manner privy to the deed, except Baylis and Bermingham themselves, and Erith, who did not claim anything under the deed. The bill further represented that Baylis and Bermingham had in fact no beneficial interest in the leasehold premises, and that the book on insurance was worthless. The bill further stated that various persons became subscribers for or purchasers of shares, and, amongst others, that Baylis subscribed for 30,000, and Bermingham for 25,000 shares, but that Baylis had paid 500*l.*, and Bermingham 250*l.* only on their shares, leaving an instalment due from each of them amounting to 1000*l.*

The bill further stated that on the 25th of August, 1855, 5500*l.* was borrowed in the name of the association from another joint-stock company, called the Unity General Assurance Asso-

ciation, and that the plaintiff had discovered, as the fact was, that this loan was obtained without the previous consent of a general meeting of the shareholders of the British Nation Life Assurance Association.

The bill then stated that representations were made to the plaintiff by Bermingham, to the effect that the annual income of the association was 1500*l.*, and that the association would soon be in a more flourishing condition, and that upon the faith of these representations the plaintiff, in 1856, became the proprietor of 5000 shares in the association, executed the deed, and paid the first instalment, amounting to 250*l.* That before becoming a shareholder the plaintiff had an interview with Baylis, who produced the deed of settlement, but never mentioned the deed of the 1st of November, 1854, or in any manner led the plaintiff to suppose that either Baylis or Bermingham had claimed to be entitled to any pecuniary or other benefit, either as promoters or otherwise, * except such as they might be * 163 entitled to under the deed of settlement.

That at a meeting of the association held on the 3d of December, 1856, Baylis and Bermingham induced the other directors present at the board meeting, including the plaintiff, who had been appointed a director, to allow the following entry to be made in the minute-book:—

“Messrs. Baylis and Bermingham having this day surrendered all right and claim to 20,000 shares each respectively held by them, and originally taken in order to facilitate in the first instance the complete registration of the association, in compliance with the Act of Parliament, and having delivered up their respective certificates for the same, Resolved: That Messrs. Baylis and Bermingham be, and they are hereby relieved from all responsibility as to calls or otherwise on account of the said 20,000 shares each so held by them. That the said shares be transferred into the names of Henry Mattock Burt, George Charles Richardson, John Thompson, and James Furnell, Esqs., in trust for the association, and that the proceeds therefrom be applied in due time to the funds of the association.”

The plaintiff stated that he allowed the foregoing entry to be made in the minute-book on the faith of the representations made

by Baylis, in the presence, and with the sanction of Bermingham, to the effect that he and Bermingham and each of them paid 1000*l.* for the shares proposed to be transferred, and that the proposed transfer would be greatly for the benefit of the association, which representations were contrary to the facts.

On the 4th of December, 1857, a circular was issued
 * 164 * “by order of the Board,” and requiring all the proprietors of shares in the association except Baylis and Bermingham to pay a call at the rate of sixpence per share; but that the plaintiff was not a party or privy to the exemption of Baylis and Bermingham from the call. The bill then alleged violations of the provision in the deed of settlement requiring ordinary general meetings of the association to be held not later than seven days after the second Wednesday in every February; and that on the 25th of February, 1858, being fifteen days after the second Wednesday in the month, notice was issued of a meeting to take place on the following 10th of March, that this meeting took place, and that resolutions were passed at it for relieving the defendant Baylis from 20,000 and Bermingham from 20,000 of their respective shares, but that the plaintiff was not present at the meeting.

The prayer was for a declaration that Baylis and Bermingham were to all intents and purposes the proprietors of all the shares for which they respectively executed the deed of settlement, and of the 3d of December, 1858, and that all entries, resolutions, and acts by which it had been attempted to relieve them from any of their shares, or whereby any of the funds of the association had been appropriated by those defendants for their personal benefit, might be declared to be illegal, fraudulent, and void. That the pretended meeting of the 10th of March, 1858, and all the proceedings thereat, might be declared to be illegal and void, and that the proceedings at any subsequent meeting might be declared to be void so far as regarded the attempted confirmation of the purchase on behalf of the association of any of the shares of Baylis and Bermingham, and that those defendants might be decreed to pay to the association the instalment of 1*s.*
 * 165 * per share and the call of sixpence per share on the whole amount of shares held by them respectively. That the association and the directors thereof might be decreed to enforce against the last-named defendants in respect of all their

shares respectively the payment of the first instalment and call, and of all future calls, and that the defendants Baylis and Birmingham might be decreed to refund the amount received by them by way of salary or otherwise over and above such sums (if any) as they were entitled to under the deed of settlement.

The other facts of the case and the nature of the arguments appear sufficiently from the judgments.

Mr. Greene and *Mr. Bromehead*, for the appellant. — They referred to *Morgan's Case*, (a) *Mangles v. The Grand Collier Dock Company*, (b) *Lawe's Case*, (c) *Preston v. The Grand Collier Dock Company*, (d) *Ernest v. Nichols*, (e) *Jackman v. Mitchell*, (g) *York and North Midland Railway Company v. Hudson*, (h) *Murray v. Palmer*, (i) *Adams v. Clifton*. (k)

Mr. Malins and *Mr. Thring*, for the association. — They referred to *Foss v. Harbottle*, (l) *Mozley v. Alston*, (m) *Australian Steam Clipper Company v. Mounsey*, (n) *Bryon v. The Metropolitan Saloon Omnibus Company*, (o) *Bennett's Case*, (p) *Ex parte Bagge*, (q) *Cockburn's Case*, (r) *Williams v. St. George's Harbour Company*, (s) *Graham v. The Birkenhead Junction Railway Company*, (t) *Carlisle v. The South Eastern Railway Company*. (u) * 166

Mr. W. W. Cooper, for the defendant Baylis. — He referred to *Taylor v. Hughes*, (v) *Kent v. Jackson*. (w)

Mr. Bacon and *Mr. H. R. Bagshawe*, for the defendant Birmingham. — They referred to *Ex parte Bignold*, (x) *Jackman v. Mitchell*. (y)

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| (a) 1 Mac. & G. 225. | (o) 3 De G. & J. 123. |
| (b) 10 Sim. 519. | (p) 5 De G., M. & G. 248. |
| (c) 1 De G., M. & G. 421. | (q) 13 Beav. 162. |
| (d) 11 Sim. 327. | (r) 4 De G. & Sm. 177. |
| (e) 6 H. L. Cas. 401. | (s) 2 De G. & J. 547. |
| (g) 13 Ves. 581. | (t) 2 Mac. & G. 146. |
| (h) 16 Beav. 485. | (u) 3 Mac. & G. 689. |
| (i) 2 Sch. & Lef. 474. | (v) 2 Jo. & Lat. 24. |
| (k) 1 Russ. 297. | (w) 14 Beav. 367; 2 De. G., M. & G. 49. |
| (l) 2 Hare, 461. | (x) 22 Beav. 143. |
| (m) 1 Phil. 790. | (y) 13 Ves. 581. |
| (n) 4 K. & J. 733. | |

Mr. Greene, in reply.

THE LORD JUSTICE KNIGHT BRUCE. — This is a bill filed in the early part of 1858 by a single plaintiff, a shareholder in a company, or an association, called the British Nation Life Assurance Association, on behalf of himself, and all other the shareholders, or proprietors of shares in the association except the defendants. And the defendants are the association as a body, and various gentlemen, who have been connected with the administration of the affairs of the association during the time to which the plaintiff considers it material to draw the attention of the Court. Whatever may be the extent of the prayer of the bill, the relief asked at the bar has been confined to these heads.

First, the defendants, who have been concerned in * 167 * the management of the association, are required to indemnify the association against the consequences of a loan, alleged, and probably with truth, to have been irregularly obtained by the managers, on behalf of the association, from another company, which loan is said to have been a transaction that occasioned loss to the association, and not to have been warranted by the terms of its constitution: on this ground the persons who were parties to it are required to make good the consequences. The next head of relief sought at the bar is against two sums of 1000*l.* each and certain annuities conceded to two of the defendants Mr. Baylis and Mr. Bermingham, two of those who were connected with the company by a deed preliminary to the complete registration of the company, called the promoters' deed. It is said that those two sums of 1000*l.* were unfairly given, unfairly obtained; that the annuities were without consideration, irregular, improper, unfair, and accordingly redress is sought, in those respects, against the persons who were parties to the transaction. In the third place, Mr. Baylis and Mr. Bermingham, two of the defendants, profess to be relieved from a great number of shares which they took; and it is alleged that that transaction was also irregular and unfair, and that they must still be continued to be deemed proprietors in the association to that extent, as if no attempt to relieve them had been made.

The plaintiff, who makes these complaints, became a shareholder in the company in the month of March, 1856, some time after its complete registration. In the same month he was elected and

became a director; and, from the time of his election to be a director until the end of the year 1857, and somewhat later (a period, therefore, exceeding a year and a half), he was an active director, constantly, or almost constantly, and with *substantial regularity attending the meetings, being paid *168 for those attendances, and appearing to perform all the duties of a director. Now this gentleman cannot be considered as an ignorant person. He is a certificated conveyancer, was so certainly as early, I believe, as the year 1854, and has been so (it is probable and I presume) ever since. He was, therefore, a certificated conveyancer when he became a shareholder and director, and cannot have ignorance of matters of business imputed to him, at least as a matter of course. From the time when he began thus to attend as a director, there were regular meetings held, and the accounts of the company and payments on behalf of the company were brought under the attention of the directors from time to time, and entered in the minutes, and (as is usual, I believe, in such cases) at the commencement of every meeting the minutes of the preceding meeting were read, and generally or universally confirmed. On several of these occasions, during the year 1856, after the plaintiff became a director, and subsequently to the year 1856, there are entries of payments on account of the loan obtained from the Unity Assurance Company. One will serve as a specimen. Among the minutes of the meeting of the 20th of August, 1856, which were confirmed at the next meeting, is, this: "No. 63, Unity General Assurance Association. On account of loan premium, 119*l.* 15*s.* 10*d.*, due 24th inst., 61*l.* 17*s.* 6*d.* — 181*l.* 13*s.* 4*d.*" An entry of that description, relating to the same transaction, occurs not twice or thrice, but on numerous occasions, so far as those periodical payments could be, according to the nature of things, within so restricted a time, numerous.

Now it is impossible, even if this gentleman had said that he was ignorant of the nature of this loan and of the nature of this transaction, to hear him say so for any effectual purpose.

It was his duty, as a director, to *understand what the *169 minute meant. If he was ignorant of the nature or origin of the transaction (which, I agree, had its inception before he became a shareholder, and therefore before he became a director), it was his duty to obtain information upon it. But, upon the whole of the evidence, it is impossible reasonably to suggest that

he relieves himself from the strong presumption against him of knowledge of the nature and particulars of that transaction. With the knowledge which it is necessary thus to impute to him, he acts upon the transaction from time to time; he leads the other directors, — he leads all who are associated with him in the management of the company, and who may well have felt confidence in his professional knowledge, to consider that he thought it unobjectionable. He has so treated it; he has not proved, if he could have effectually offered evidence for the purpose of proving, that he was ignorant or misled in the matter; and upon the materials before us he must, in my opinion, be taken, as far as his interests are concerned, completely to have adopted it, and to have excluded himself from all ground of complaint on that head, whatever ground of complaint other persons may have.

We then come to the 1000*l.* apiece paid to Mr. Baylis and Mr. Bermingham, as promoters of the association, before this gentleman joined it, and the annuities granted to them on that occasion by what is called the promoters' deed of the 1st of November, 1854 (upon which I agree with the plaintiff, that it is hardly possible to make observations too strong). [His Lordship read the material parts of the deed.] This deed is mentioned in the minute-book upon an occasion previous to the time when the plaintiff became a shareholder in the institution; and I agree

that it might very possibly be too strict to hold that he
 * 170 was bound to look back through * the book, and to read every entry that had preceded the commencement of his directorship. There is, however, in the year 1854, this entry: —

“ Resolved, that the promoters' deed, as prepared by Messrs. Trinder & Eyre, solicitors to the association, having been read by G. P. L. Eyre, Esq., of the firm aforesaid, being cordially approved of, be now confirmed, and that such assignment of agreement for lease of 35, Cranbourne Street, Leicester Square, and of a copyright in a certain book, entitled ‘ An Essay upon Life Assurance, illustrative of the modern Application of its Principles to the Requirements of the Living,’ being accepted in its integrity, shall now and hereafter be held binding upon the present or any future directors of the British Nation Life Assurance Association. Mr. Baylis, Mr. Bermingham, and Mr. Norton

Erith, during the consideration of the deed of assignment upon certain conditions of their right, title, interest, and estate in 35, Cranbourne Street, and in their copyright of an essay, upon the principles of which therein detailed is founded the British Nation Life Assurance Association, declined to use their privileges as directors, and accordingly did not vote or take any part in the decision of the other directors present."

I do not impute to the plaintiff the knowledge of the entry, but considering what the deed was, considering how it connected irremovable officers (at least officers substantially irremovable) with the association, and provided for the annuities, for which it did provide, it is in the highest degree improbable that the plaintiff should not have early been aware of it. He appears upon his own statement to have been, some time after he became a director, aware that there was some such instrument; when, he does not say, but the answers obviously called his attention to that subject; and the state of the pleadings, *and the evi- *171 dence, I think, rendered it incumbent on him, if he desired not to have a very early knowledge of the instrument imputed to him, to be precise in his statements and evidence upon that point. The unavoidable inference from the evidence, independently of the entries, to which I am about to allude, is that he became early aware, either in every sense literally of the instrument itself, or at least that there was an agreement, containing such provisions, or provisions to that effect, which affected, or purported to affect, the association. But we find throughout the years 1856 and 1857 references to the annuities under the deed, of a nature the same in effect, *mutatis mutandis*, as those relating to the loan obtained from the Unity Association. One will serve as a specimen of the whole. I open the book at the 24th of September, 1856; these entries are there:—

"The following drafts are approved of, drawn, and signed, namely, No. 76, Mr. Baylis's annuity to Michaelmas, 125*l.*" (that of course was the fourth of 500*l.*); "Mr. Bermingham, ditto, 62*l.* 10*s.*; Messrs. Trinder and Eyre, ditto, 62*l.* 10*s.*;" this being the 250*l.* a year which they were to be paid by way of salary as irremovable solicitors, in addition to those costs which they were to receive otherwise. Now these payments occur from time to time as I have already said in the book. They are entered in the

minutes in the presence of Mr. Burt; and each set of minutes is confirmed at the next meeting in his presence. It is impossible to suppose that any man could have these documents read to him, or could draw checks, or see checks drawn, for annuities to Mr. Bermingham and Mr. Baylis, and Messrs. Trinder and Eyre, without asking what they were. Mr. Burt must, before the end

of the year 1856, have had actual notice and knowledge of
 * 172 the provisions of the deed, which deed, *independently of the annuities, provided also for the payment of the two sums of 1000*l.* each to Mr. Bermingham and Mr. Baylis.

That being so, all the observations applicable to the transactions with the Unity Assurance Company apply to this. A man of business, with knowledge of the facts, allows his brother directors to act and proceed upon the notion that he affirms and adopts those transactions; and this course goes on from quarter to quarter, from half year to half year, during the years 1856 and 1857. It is possible to suppose a case in which a director, even though a member of the profession of the law, might defend himself from the charge of acquiescence and confirmation upon the ground that he was deceived or misled, or that he was ignorant of something which it was his duty to know. The evidence forbids any such assumption in this case. There is not in my opinion the least proof that he was deceived; there is not the least proof that he was ignorant of any thing material that it was his duty to know. Accordingly, I think that these transactions stand exactly on the same footing as the transaction with regard to the Unity Assurance Company.

It seems that two sums of 1000*l.* were paid out of the funds of the company, or future company, to Mr. Baylis and Mr. Bermingham, and were applied by them in paying the first instalment on the shares which they acquired. That is of no moment on the present occasion; but what is of moment is the deliverance subsequently, or attempted deliverance, of Mr. Baylis and Mr. Bermingham from the shares on which they paid the 2000*l.* so indescribably acquired. That transaction took place also in the year 1856, in the month of December. I turn to the minute of the 3d of December, 1856. [His Lordship read it. (a)]

* 173 In this Mr. * Burt must be taken to have concurred; and the minutes of that meeting are adopted and confirmed at

(a) *Ante*, p. 163.

the next. On the 12th of December, 1856, the minutes of the last board, and of the extraordinary meeting of the directors held this day, are read and confirmed, Mr. Burt being a party.

This having taken place in December, 1856, no complaint, no objection, appears to have been made on the part of any one else during the year 1856 or the year 1857, as I understand. But it appears that this transaction has been formally completed by a transfer of the shares in the books, without waiting for the authority of a general meeting; and, accordingly, in February, 1858, a resolution was come to not at all departing from the resolution of December, 1856, but with the view, as I collect, to a confirmation of the transaction by a general meeting. That is done in March, 1858 (the month in which the bill was filed), but irregularly done. It is done with more formality (if such a transaction could be confirmed effectually) by a meeting in the month of April, the month after the filing of the bill, upon which, as I understand it, the Vice-Chancellor appears as to this part of the case mainly to have proceeded. I am of opinion, however, looking only at what took place in December, 1856, that by the conduct of the plaintiff at that time, and his conduct afterwards, he has precluded himself from any right of complaint, whatever right of complaint others may have, either as against the defendants or as against the plaintiff himself.

As to that it is not necessary to give an opinion. He has sued on behalf of himself and others, and notwithstanding what has been contended on the part of the defendants, I assume that there still exist persons who have a right to complain of these transactions. But * that will not give the plaintiff a * 174 title to sue for them. As on one hand a plaintiff, who has a right to complain of an act done to a numerous society of which he is a member, is entitled effectually to sue on behalf of himself and all others similarly interested though no other may wish to sue, so, although there are a hundred who wish to institute a suit and are entitled to sue, still if they sue by a plaintiff only, who has personally precluded himself from suing, that suit cannot proceed. The present case in my opinion stands upon the same footing as if the dissatisfied shareholders (supposing them to be dissatisfied) had sued by a plaintiff who had released the defendants. For that in my opinion is the position in which effectually Mr. Burt has placed himself.

Whether, therefore, agreeing or disagreeing with the particular ground on which his Honor the Vice-Chancellor has proceeded, I apprehend that the grounds which I have stated are amply sufficient to render a dismissal of the bill necessary. The bill has been dismissed with costs. I doubted for some time as to the costs, on account of the conduct that has been exhibited on the part of some of the parties to this record; but, on the whole, I do not think it sufficiently clear that the bill should have been dismissed without costs, to render it fit for me to give a voice for altering what has been done in that respect. I am of opinion, however, that in dismissing the appeal it should be dismissed without costs.

THE LORD JUSTICE TURNER. —I entirely agree with my learned brother, and for exactly the same reasons, which therefore I do not think it necessary to repeat. I desire only to add that I think the argument on public policy is not applicable to the case, because the transaction is one which might be confirmed by all the shareholders, and if so confirmed would not be against public policy.

1859. May 9. Before the Lord Chancellor Lord CHELMSFORD.

The costs of an infant defendant in a suit, in which there had been a great amount of litigation, and in which he was unsuccessful, were ordered to be paid out of the estate, on the understanding that no further litigation should take place. He attained twenty-one shortly before the expiration of five years, within which the decree might be enrolled, and two years afterwards applied for leave to enrol the decree. *Held*, not a case in which it was just and expedient to make the order.²

THIS was the petition of a defendant named Robert Phillips Dearden Monypenny, for leave to enrol a decree of the 20th July, 1852, and also, if necessary, two decrees of the 7th May, 1850, and the 18th July, 1851, notwithstanding the lapse of five years since the dates of the decrees. The former decree had been made

¹ S. C., 9 H. L. Cas. 149 n.

² 2 Dan. Ch. Pr. (4th Am. ed.) 1521.

by Vice-Chancellor WIGRAM, and the other by Vice-Chancellor KNIGHT BRUCE. Appeals from them had been presented to Lord ST. LEONARDS, then Lord Chancellor, who, on the 20th July, 1852, affirmed the two decrees. The case is reported on these appeals in 2 De Gex, Macnaghten, & Gordon, p. 145.

The decrees were adverse to the present petitioner, who was then an infant, and on the hearing of the appeal the Lord Chancellor gave the infant his costs out of the estate, upon his counsel undertaking, as instructed by the guardian *ad litem*, that such decree should be final.

The petitioner attained the age of twenty-one on the 9th of May, 1857, and was desirous of appealing to the House of Lords from the several decrees, and of having them enrolled for that purpose, but as five years had elapsed since the date of the decrees, no enrolment could, under the 2d, 3d, 5th, and 6th Orders of 7th August, 1852, (a) be made, without the leave of the Court.

* *Mr. Malins* and *Mr. C. Clement Berkeley*, in support * 176 of the application. — By the 103d of the Standing Orders of the House of Lords, (b) the petitioner has two years after

(a) Order 23, rules 25, 26, and 28 of Consolidated Orders.

(b) The following is the order referred to : It is ordered that no petition of appeal from any decree or sentence of any Court of Equity in England or Ireland, or of any Court in Scotland, before this time, signed and enrolled or extracted, shall be received by this house after two years, to be accounted from the expiration of this present session of Parliament, and the end of the next session ensuing the said two years, nor shall any petition of appeal from any decree or sentence of any of the said Courts to be hereafter signed and enrolled or extracted be received by this house after two years from the signing and enrolling or extracting of such decree or sentence, and the end of fourteen days, to be accounted from and after the first day of the session or meeting of Parliament next ensuing, the said two years, unless the person entitled to such appeal be within the age of twenty-one years, or covert, *non compos mentis*, or out of Great Britain and Ireland, in which case such person shall and may be at liberty to bring his appeal for reversing any such decree or sentence at any time within two years next after his full age, discoverture, coming of age, sound mind, enlargement out of prison, or coming into Great Britain or Ireland, and fourteen days to be accounted from and after the first day of the session or meeting of Parliament next ensuing the said two years, but not afterwards or otherwise; and it is further ordered that in no case shall any person or persons be allowed a longer time on account of mere absence to lodge an appeal than five years from the date of the last decree or interlocutor appealed against.

attaining twenty-one to lodge an appeal. The undertaking given at the hearing before Lord ST. LEONARDS was not a condition imposed by the Court, but merely such an undertaking as the parties were capable of giving, and we submit that nothing was done to deprive the petitioner of the right to appeal. The undertaking of the infant by the guardian *ad litem* was not binding upon him. *Taylor v. Philips*, (a) *Turner v. Turner*. (b) The

infant had five years to enrol the decree and two years * 177 after *attaining twenty-one to appeal to the House of Lords. This case is distinguishable from *Wellesley v. Wellesley*, (c) in which the time for appealing had expired as well as the time for enrolling the decree. We submit that it is in the power of the Lord Chancellor to enlarge the time, and that nothing stands in the way of appeal but the compromise, which is in fact no obstacle to the application, not being binding upon the petitioner. If this application is refused there will be an antagonism between this Court and the House of Lords, the house giving time, but this Court saying that the time has expired.

Mr. Selwyn and *Mr. C. Hall* appeared for the respondents, but were not called upon by the Court.

THE LORD CHANCELLOR. — I think that this case ought not to occupy any further time. I am not called upon to consider whether I can bind the estate or enforce a contract with an infant upon such an undertaking as has been given in the present case. What I am asked to decide is, that it is, in the terms of the 6th General Order, “just and expedient” to enlarge the period appointed by the orders for enrolling the decree.

If there had been no agreement or understanding at all on behalf of the infant, and five years had expired with even the addition of the two which have elapsed since he attained twenty-one, I might, in a proper state of circumstances, have been disposed to grant the application. But in considering whether it is just and expedient to make the order, I must look at all the circumstances of the case. There has been in it a great amount of litigation, and the case has been before various

(a) 2 Ves. 23.

(c) 3 De G. & J. 164.

(b) 2 De G., M. & G. 28.

tribunals. * In 1852, Lord St. LEONARDS gave a decision * 178 adverse to the petitioner, and then the question of costs arose, and they were asked for, on behalf of the infant, out of the estate. The Lord Chancellor thought that there should be an end of the contest, and he was not disposed to give costs out of the estate unless for the purpose of preventing further litigation. On behalf of the infant this was consented to, and he obtained a benefit by receiving, by himself or his guardian, payment of costs, which, but for the consent, would not have been so received. It is said that this was an imprudent bargain for the infant, and that he is not bound by it, and if he had come promptly, after attaining twenty-one, the application might have been attended to. But he attained majority two months before the expiration of the five years during which the decree might have been enrolled, and he allowed two years to elapse without attempting to question the arrangement in any manner. The other parties may reasonably have supposed that there was no intention to question it, and they have, in fact, acted under that impression, and thus new rights have been created. The infant then comes, two years after attaining his majority, and tries to undo all that has been done and to set aside the decree.

I think that it is not just and expedient to grant this application. I am bound by the General Order, unless a peculiar state of circumstances is made out rendering it just and expedient to dispense with it, and no such case is here shown.

Petition dismissed with costs.

1859. May 2, 3, 12. Before the Lord Chancellor Lord CHELMSFORD and the LORDS JUSTICES.

A testator directed his trustees to invest his residuary estate, and suffer the interest to accumulate until the principal, together with the accumulation of interest, should amount to "3000*l.* or thereabouts," and then to place out the same at interest, and pay the interest equally among certain specified legatees named in the will in equal shares during their lives and the life of the survivor; and in case any of them should happen to die leaving lawful issue, the issue were to be entitled to the same share in the interest to which their parents would, if living, have been entitled, and immediately after the decease of the survivor of the legatees specifically named, then, upon trust, to pay the "3000*l.* or thereabouts" equally among the lawful issue of the specified legatees to whom the testator gave and bequeathed the same, but in case any of them should happen to be then dead leaving lawful issue, such issue were to be entitled to the share to which the parent or parents of such issue would, if living, have been entitled.

Held, that the gift of the "3000*l.* or thereabouts" was not void for uncertainty or remoteness, but that the disposition of the income accruing between the expiration of the period allowed by the Thellusson Act and the end of the time required to accumulate the 3000*l.* was invalid, and that the income for that period was undisposed of, and belonged to the next of kin.¹

THIS was an appeal from a decree of Vice-Chancellor STUART.

John Oddie, by his will, dated the 21st of September, 1821, after directing payment of debts, funeral, and testamentary expenses out of his personal estate, and after bequeathing certain specific and pecuniary legacies, gave all his residuary personal estate to trustees upon trust for conversion into money and payment thereout of all his just debts, funeral, and testamentary expenses, and after payment thereof, to place out 40*l.* at interest; and after directing the application of the income and capital of this sum, and directing his trustees to apply so much of the residue of his personal estate and effects, or the interest thereof, as the trustees should think proper for the maintenance and

¹ See Lewin Trusts (5th Eng. ed.), 72, 73; Bateman v. Hotchkin, 10 Beav. 426; Briggs v. Earl of Oxford, 1 De G., M. & G. 363; Williams v. Lewis, 6 H. L. Cas. 1013; Perry Trusts, §§ 396, 397; Conner v. Ogle, 4 Md. Ch. 443; 1 Jarman Wills (3d Eng. ed.), 287, 292, 332, 333.

bringing up of Nancy Howson until she attained twenty-one, the testator directed his trustees to stand possessed of all the rest, residue, and remainder of his personal estate and effects whatsoever not thereinbefore disposed of upon trust to
 * place out the same at interest upon government, real, or * 180
 some other good and sufficient security or securities, or in some banker or bankers' hands, and suffer the interest arising from the same to accumulate until the principal, together with the accumulation of interest thereon, should amount to the principal sum of 3000*l.* or thereabouts, and when and so soon as the principal sum and interest should amount to the sum of 3000*l.* or thereabouts, then upon trust to put and place out the same at interest upon such security or securities as aforesaid and pay and apply the yearly interest, dividends, and profits thereof, from time to time as the same should become due, unto and equally between or amongst Christopher Oddie Tomlinson, John Howson, Robert Howson, and Nancy Howson (children of Richard Howson deceased), and Jane Wilson, William Oddie, and Joseph Oddie the younger (children of the testator's nephew John Tatham Oddie), in equal shares and proportions, during their several and respective natural lives and the life of the survivor of them; and in case any of them should happen to die, leaving lawful issue, the testator willed and directed that such issue should be entitled to the same share of and in the interest, dividends, and profits of his personal estate and effects which his, her, or their parents would, if living, have been entitled unto. And from and immediately after the decease of the survivor of them Christopher Oddie Tomlinson, John Howson, Robert Howson, Nancy Howson, Jane Wilson, William Oddie, and Joseph Oddie the younger, then upon trust to pay and apply the principal sum of 3000*l.* or thereabouts, so placed out as aforesaid, and convey and assure his close of land called Fitzdale or Fitzhampland, with its appurtenances, situate in Burton, in the parish of Thornton in the county of York (thereinafter devised unto his trustees), unto and equally amongst the lawful issue of * Christopher * 181
 Oddie Tomlinson, John Howson, Robert Howson, Nancy Howson, Jane Wilson, William Oddie, and Joseph Oddie the younger, which should be then living, their heirs, executors, administrators, and assigns for ever, share and share alike, as tenants in common and not as joint tenants, to whom the testator

gave, devised, and bequeathed the same. But in case any of them should happen to be then dead leaving lawful issue then living, it was his will and mind and he thereby ordered and directed that such issue should be entitled unto and take the part or share, parts or shares, of and in the trust money, close of ground, and premises which the parent or parents of such issue respectively would, if living, have been entitled unto, and not more or otherwise, any thing therein contained to the contrary notwithstanding.

The testator died in the year 1822.

On the 1st of March, 1851, the present suit was instituted, seeking to have the trusts of the will carried into execution under the direction of the Court.

Upon the chief clerk's certificate, made in pursuance of the decree at the hearing, it appeared that the residuary personal estate and the accumulations thereon had not nearly amounted to 3000*l.* within twenty-one years, the time prescribed by the Thellusson Act (39 & 40 Geo. 3, c. 98), and the questions which arose upon the cause coming on for further consideration, and which were the subject of the present appeal, were, whether the bequest of the accumulations of the income was not altogether void for remoteness; and if not, whether the income, after

*182 the expiration of the twenty-one years allowed by * the Act, was disposed of by the will or belonged to the testator's next of kin.

The Vice-Chancellor held that the bequest was, independently of the Act, too remote. The residuary legatees appealed.

Mr. Bacon and *Mr. Birkbeck*, in support of the appeal. — The bequest of the 3000*l.*, or thereabouts, is not void for uncertainty: *Seale v. Seale* (a); nor for remoteness: *Williams v. Lewis*, (b) *Blease v. Burgh*, (c) *Saunders v. Vautier*. (d)

But as the trust-fund, with the accumulations thereon, did not amount to 3000*l.* within twenty-one years after the testator's death, which is a period beyond which a further accumulation is prohibited by the Thellusson Act, the residuary legatees were, at the end of the twenty-one years, entitled to receive the income thenceforth arising from the residue of the personal estate, and

(a) 1 P. Wms. 290.

(c) 2 Beav. 221.

(b) 5 Jur. N. S. 323.

(d) Cr. & Ph. 240.

from the accumulations up to that period, in the same manner as they would have been entitled to receive the income of the 3000*l.* in the event of the residue of the personal estate, and the accumulations of interest thereon, having amounted to that sum within the twenty-one years.

Mr. Elmsley, Mr. Chapman Barber, and Mr. Freeling, for the next of kin. — The bequest of the 3000*l.*, or thereabouts, is wholly * void for uncertainty. *Cherry v. Mott*, (a) *Curtis v. Lukin*. (b) But if not, it is too remote, being a gift of a sum which cannot be realized within lives or a life in being, and twenty-one years afterwards. *Lord Dungannon v. Smith*, (c) *Boughton v. James*, (d) *Martin v. Maughan*, (e) *Curtis v. Lukin*. (b) If, however, the whole gift is neither too uncertain, or too remote, then the interest arising from the residue, after the expiration of twenty-one years from the testator's death up to the time when the principal of the testator's residuary personal estate would have amounted to 3000*l.*, belongs to the testator's next of kin.

The following authorities were also referred to: —

As to remoteness, *Lord Southampton v. Marquis of Hertford*, (g) *Marshall v. Holloway*, (h) *Tregonwell v. Sydenham*, (i) *Browne v. Stoughton*. (k)

As to the Thellusson Act, *Bateman v. Hotchkin*, (l) *Phipps v. Kelynge*, (m) *Speakman v. Speakman*, (n) *Longdon v. Simson*, (o) *Shaw v. Rhodes*, (p) *Evans v. Hellier*, (q) *Elborne v. Goode*, (r) *Nettleton v. Stevenson*, (s) *Bourne v. Buckton*. (t)

Mr. Malins, Mr. Prendergast, and Mr. S. Smith, for other parties.

(a) 1 Myl. & Cr. 123.

(b) 5 Beav. 147.

(c) 12 Cl. & Fin. 546.

(d) 1 Coll. 26.

(e) 14 Sim. 230.

(g) 2 V. & B. 54.

(h) 2 Swan. 432.

(i) 3 Dow, 194.

(k) 14 Sim. 369.

(l) 10 Beav. 426.

(m) 2 Ves. & B. 57 n. (b).

(n) 8 Hare, 180.

(o) 12 Ves. 295.

(p) 1 Myl. & Cr. 135.

(q) 5 Cl. & Fin. 114.

(r) 14 Sim. 165.

(s) 3 De G. & Sm. 366.

(t) 2 Sim. N. S. 91.

Mr. Bacon replied.

Judgment reserved.

* 184 * THE LORD CHANCELLOR. — The question in this case arises upon the residuary clause in the will of John Oddie, made on the 21st September, 1821. That clause is as follows: [His Lordship read it.]

Vice-Chancellor STUART was of opinion that this residuary bequest is void for remoteness, and, consequently, that the next of kin of the testator are entitled to the residue. The parties who would be entitled to shares in the income and capital of the residuary personal estate, if this bequest is not void, have appealed against the decree.

It is, perhaps, not very easy to determine what was the real intention of the testator as expressed in this gift of the residue; and, therefore, it seems to me that the only safe guide to follow is to take his language in its primary and obvious sense. Did he, then, by the words which he has used, indicate his intention to give the residue to the persons named, with a subsidiary direction to accumulate, or did he mean that the gift of the residue should be dependent upon the previous accumulation? The latter appears to me to be the correct conclusion.

It is to be observed that the testator does not give the residue to the persons proposed to be benefited, but to his trustees; nor does he give it to the trustees in trust for these persons in the first instance, but upon trust to place it "upon government, real, or some other good and sufficient security, or in some bankers' hands, and suffer the interest to accumulate until the principal and the accumulation of interest shall amount to the principal sum of 3000*l.*, or thereabouts."

* 185 * So far, there is no gift of the residue to any one but to the trustees. But the will proceeds, "And when and so soon as the principal and interest shall amount to 3000*l.*, or thereabouts, then upon trust, to place the same at interest," &c., "and pay and apply the yearly interest, dividends, and profits," equally amongst the seven persons named for their lives and the life of the survivor.

It was said that these words, "when and so soon," are words

of flexible meaning, and that they always bend to the intention of the testator. Perhaps it would be more correct to say that their effect depends upon whether they must be considered as annexed to the substance of the gift or to the period of payment.

In the present case, these words are not merely contained in the direction to pay and apply, but they introduce the gift itself, and, therefore, they must be taken to be of the substance of the gift, unless any indication to the contrary can be gathered from the context of the will, of which I can find none.

The distinction between this case and that of *Saunders v. Vautier* (a) appears to me to be that, in that case, there was an immediate gift of a fund (the East India stock) which was separated from the estate, and vested in trustees to accumulate until the testator's great nephew attained twenty-five: here there is strictly speaking no fund to which the gift can apply, until the fund itself of 3000*l.* is created by the prescribed period of accumulation having been reached.

When the accumulated sum shall amount to 3000*l.*, or thereabouts, — then, and not till then, the interest is to be applied.

* What then is the effect of this direction for accumula- * 186
tion; is it void for uncertainty, or is it void for remoteness, for both these points have been insisted upon?

It is argued that it is void for uncertainty on account of the words "or thereabouts," which follow the stated amount of the accumulated sum wherever it is named. I am not satisfied, however, that these superadded words introduce such uncertainty as to render the direction for accumulation void. I think that, supposing the clause to accumulate could be fully maintained, the trustees would be bound to continue the accumulation until it reached the sum of 3000*l.* at the least, and that the additional words were inserted merely to meet the difficulty which would necessarily arise in accumulating up to the exact limit, and to render any little excess subject to the same disposition as the specified sum.

The case of *Curtis v. Lukin* (b) was cited for the purpose of showing that a trust to accumulate until certain leases should become nearly expired was held void for uncertainty; but it

(a) 1 Cr. & Ph. 240.

(b) 5 Beav. 147.

appears that the use of the word “nearly” did not create the uncertainty upon which Lord LANGDALE proceeded in that case, but that it arose upon the amount of the shares which the legatees were to take in the fund to be accumulated.

But assuming the trust for accumulation not to be uncertain, is it void for remoteness? It appears that the testator having died in 1822, after thirty-seven years from his death the accumulated fund amounts only to 1600*l*. If this had been a question independent of the Thellusson Act, I should have considered that the

trust for accumulation would have been throughout within
 *187 the prescribed *limits, as the testator has not postponed the enjoyment of the principal sum beyond the period within which it is required by law that it should vest. For he appears to me to have manifested an intention that upon the death of the survivor of the persons who were to have the interest of the accumulated fund, those who would be entitled to the fund itself were to have it amongst them, whatever its amount, and therefore that the accumulation could not have been carried on beyond a life or lives in being.

The Thellusson Act, however, does not allow the accumulation of personal property during any lives except those of the grantors or settlors, nor for a longer period than twenty-one years; and where any accumulation shall be directed otherwise, it enacts that such direction shall be null and void, and the rents, issues, and produce of the property so directed to be accumulated shall, so long as the same shall be directed to be accumulated contrary to the provisions of the Act, go and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed.

It was said by *Mr. Elmsley*, that the Thellusson Act could not apply to the form of gift contained in this will, upon the ground (I presume) that the accumulation was not to be measured by any number of years. Perhaps the best answer to this observation (for it was nothing more) would be to mention the case of *Elborne v. Goode*, (a) in which the accumulation was to take place until the decease of the survivor of certain annuitants, and the case of *Bourne v. Buckton*, (b) which was a trust to accumulate the income of the residue of the testator’s personal estate during the life of his niece, and in each of which cases it was

(a) 14 Sim. 165.

(b) 2 Sim. N. S. 91.

held that the Thellusson Act applied, and stopped the *accumulation at twenty-one years from the testator's *188 death. But I think that if a person directs the accumulation of his personal property, till it reaches a certain sum, it is virtually a direction for accumulation for the number of years requisite to produce that sum, and that when the period prescribed by the statute arrives, it steps in and stops the further progress of the accumulation. In this case, therefore, I am of opinion that the statute permitted the accumulation for twenty-one years, but no longer.

The accumulated fund, however, cannot be divided until the death of the survivor of the seven persons who were to have the interest for life, and these persons cannot have the benefit intended for them, because the fund has not reached the amount which was a preliminary condition to their becoming entitled. What then becomes of the interest of the fund between the period of twenty-one years from the death of the testator and the time when the fund itself becomes divisible under the will? It clearly belongs to the next of kin; and to prove this it is only necessary to refer to the two cases which I have already mentioned, of *Elborne v. Goode* and *Bourne v. Buckton*.

Upon the whole case, therefore, I am of opinion that the decree is erroneous, so far as it declares the trust for accumulation to be void for remoteness, and declares that the testator's residuary personal estate on his death passed to his next of kin, and that it ought to be varied. That there ought to be a declaration, — that the trust for accumulation is good, to the extent of twenty-one years from the death of the testator, — that from that period the income of the accumulated fund belongs to the next of kin, until the death of the survivor of the legatees, to whom the interest of the fund is bequeathed, and that upon the death of the survivor, the fund — to the amount of the accumulation during the twenty-one years after the death *of the testator — will become divisible amongst *189 such of the issue of the seven first-named persons as shall be then living.

Costs to be costs in the cause.

THE LORD JUSTICE KNIGHT BRUCE. — This appeal has called on the Court to interpret the will of John Oddie, a gentleman or

yeoman of Craven, who died in the year 1821 or 1822, — an instrument so mysteriously constructed, that one is agreeably surprised to find the four Judges before whom it has been brought for exposition arriving at only three different conclusions upon it.

From the reading of the Vice-Chancellor I respectfully dissent. The Lord Justice and the Lord Chancellor differ from both, but have been able to agree together. The principal question seems to me to be, whether the phrase “3000*l.* or thereabouts,” where it occurs for the first time and for the second time in the instrument, is of any efficacy. And the opinion that, upon consideration, I have formed is, that in each of those instances the expression is too loose, vague, and uncertain to be acted on. I take it to mean there “3000*l.* or some other sum near 3000*l.* ;” but whether 3000*l.* or some other sum, or if not 3000*l.* what other sum the testator has not said. The will, therefore, is, in my judgment, to be construed not more favourably for accumulation than if a blank had been left in it for the extent and amount of the accumulation of which it speaks.

Then did the testator intend accumulation to be essential?

Did he mean the gifts in his will of beneficial interests in
* 190 the residue of his personal estate to John * Howson and others to be conditional and dependent on accumulation?

In my judgment, not. I think that, while the direction to accumulate has failed, the trusts of the property which he had vainly, in my opinion, directed to be accumulated, took effect notwithstanding that failure ; and I conceive that, subject to the provision for the “maintenance and bringing up” of Nancy Howson until her majority, the tenancies for life of John Howson and others took effect, as if without a word on the subject of accumulation the clear residue of the personal estate had been given by the will to the trustees upon trust to “pay and apply” (I now borrow its language) “the yearly interest, dividends, and profits thereof, from time to time, as the same shall become due unto and equally between or amongst Christopher Oddie Tomlinson, John Howson, Robert Howson, and Nancy Howson, children of the said Richard Howson deceased and grandchildren to the said Ann or Nancy Tomlinson, and Jane Wilson, William Oddie, and Joseph Oddie the younger, children of my nephew John Tatham Oddie, in equal shares and proportions, during their several and respective natural lives and the life of the survivor of them ; and

in case any of them should happen to die, leaving lawful issue, I will and direct that such issue shall be entitled to the same share of and in the said interest, dividends, and profits of my said personal estate and effects which his, her, or their parents respectively would, if living, have been entitled unto; and from and immediately after the decease of the survivor of them the said Christopher Oddie Tomlinson, John Howson, Robert Howson, Nancy Howson, Jane Wilson, William Oddie, and Joseph Oddie, then upon trust to pay and apply" (I now leave the language of the will) the capital of the clear residuary personal estate (I now return to its language) "unto and equally among the lawful issue of the * said Christopher Oddie Tomlinson, John * 191 Howson, Robert Howson, Nancy Howson, Jane Wilson, William Oddie, and Joseph Oddie, which shall be then living, their heirs, executors, administrators, and assigns for ever, share and share alike, as tenants in common," and so on. Consequently, if I am right, there has not been, is not at present, and very possibly will not be, any intestacy as to the whole or any part of the beneficial interest in the testator's personal estate, either as to capital or as to income.

In expressing myself thus I have, however, assumed that the testator was survived by all the seven tenants for life, namely, by Christopher Oddie Tomlinson, John Howson, Robert Howson, Nancy Howson, Jane Wilson, William Oddie, and Joseph Oddie.

I consider that the testator, by the expression, "put and place out the same at interest upon such security or securities as aforesaid," meant "put and place out my residuary personal estate at interest upon such security or securities as aforesaid;" and I construe the phrase "3000*l.* or thereabouts," where it occurs for the third time in the will, as importing neither more nor less than "my residuary personal estate," the beneficial title to the capital of which, and its income from the testator's decease, I consider to be all that is at present in controversy in the suit.

I may add (perhaps unnecessarily) that if I am right in my view of the will so far as I have stated it, two questions may arise: One, what, until the death of the surviving tenant for life, is to become of the share of income of any of the tenants for life who have already died without leaving issue or without leaving a child, or shall, before the decease of the surviving tenant for * life, die without leaving issue or without leaving a * 192

child. And the other, what if, at the death of the surviving tenant for life, there shall be a failure of the issue, or a failure of children and grandchildren of each of the seven tenants for life, is then to become of the capital of the residuary personal estate.

THE LORD JUSTICE TURNER. — John Oddie, the testator in these causes, by his will, dated the 21st September, 1821, gave and bequeathed all the residue of his personal estate to trustees upon trusts which are declared in these terms: [His Lordship read them.]

The testator died in the year 1822, and the residue of his personal estate having been accumulated for the period of twenty-one years from the time of his death (being the period beyond which accumulation is prohibited by the Thellusson Act), it has been found that the residue, with the accumulations, did not amount to the sum of 3000*l*.

Under these circumstances, the Vice-Chancellor, Sir JOHN STUART, having been required, on the hearing of these causes for further consideration, to determine to whom the residue of the testator's personal estate, with the accumulations upon it, belonged, has, by his order, declared that the testator's residuary bequest was and is void for remoteness; and that the testator's residuary personal estate passed, upon his death, to his next of kin, according to the Statute of Distributions, and has ordered distribution to be made accordingly.

The appeal before us, which is presented by one of the
* 193 parties interested under the will in the testator's *residuary estate, if it is well disposed of by the will, complains of this order of the Vice-Chancellor, and, of course, therefore, it opens every point upon the construction of the will.

We have now, therefore, to adjudicate upon the question whether this will contains a valid and effectual disposition of the testator's residuary personal estate and the accumulations upon it, or whether the dispositions of the will are void as to all or any part of the estate or of the accumulations.

The case, as I view it, presents three points for our consideration. First. Whether the will at all disposes of the residue, and the accumulations upon it, in the event which has happened of their not amounting to 3000*l*., or any thing approaching that sum,

within the period of accumulation allowed by law? Secondly. Whether, assuming the residue to be disposed of by the will, although it does not, with the accumulations allowed by law, approach the sum of 3000*l.*, the direction to accumulate is void upon the ground of the uncertainty arising from the words “or thereabouts” used by the testator in connection with the sum of 3000*l.*, — “the principal sum of 3000*l.*, or thereabouts?” And thirdly. Whether, assuming the dispositions of the will not to be invalid on either of these grounds, they are invalid as to the whole or any part of the residue, or of the accumulations, upon the ground of remoteness?

As to the first point, where, as in this case, funds are given to trustees to be held by them upon trusts, directions must of course be given to the trustees as to the time and manner in which they are to deal with the funds in favour of the persons for whose benefit they are intended. Words, therefore, which in other cases might *import condition or contin- *194 gency, may, in such cases, be used for a wholly different purpose, — for the purpose, namely, of conveying the necessary directions to the trustees. The Court, therefore, in such cases, looks, as I apprehend, more to the substance of the gift than to the words in which it is expressed. It considers for whose benefit the gift was made, — who were intended to be the *cestuis que trust*.

The cases of *Love v. L' Estrange* and *Saunders v. Vautier* may, amongst others, be referred to as bearing out this view; and certainly this mode of considering cases like that now before us is not less followed by the Court where, as in the present case, the disposition is of the residue, of which *Booth v. Booth* is a remarkable instance. The Court, in such cases, leans against intestacy.

Now, looking at this will, it cannot, I think, be doubted that the testator intended the residue to go to the persons whom he has named; and I think, therefore, that, following the cases to which I have referred, we must consider the words, relied on by the next of kin as importing condition or contingency, to have been intended merely for the direction of the trustees, as meant to describe the event in which the enjoyment was to commence, and not as operating to prevent the vesting in interest. I think, therefore, that the argument on the part of the next of kin upon the first point fails.

Then, as to the second point, it does not appear to me that the words "or thereabouts" create any such uncertainty as to render the trust for accumulation void. The testator points to the sum of 3000*l.* as the fund to be accumulated, and certainly he could not intend, by adding the words "or thereabouts," to

* 195 cover any considerable * deficiency. The difficulty suggested is, that it could not be said when the accumulation would stop; but surely it is a sufficient answer to this objection to say that it could not have been intended to stop whilst there was so considerable a deficiency as exists in this case. If, however, it be necessary to give a precise and definite meaning to these words, I think that the nature of the trust furnishes the means of doing so. The testator was dealing with a fund to be created by accumulation of income, and when the fund approached to nearly 3000*l.*, the next investment of income might carry the fund beyond that sum.

It is not, I think, any strained construction to assume that it was to this the testator referred when he used the words "or thereabouts."

There remains then the question of remoteness, and I do not think that the dispositions of this will are void upon that ground. The Vice-Chancellor, as I collect from his judgment, has considered them to be so because the 3000*l.* might not be accumulated within the period allowed by law for the vesting of interests, but in arriving at this conclusion he proceeds upon the footing that nothing vests in interest until the 3000*l.* is accumulated. Upon that point I respectfully dissent from his opinion for the reasons already stated; and, differing from him upon that point, I have not to encounter the weight of his judgment upon this question of remoteness. He has not, as I understand the judgment, at all indicated what his opinion would have been had he thought, as I think, that according to the true construction of this will the vesting of the interests in the residue is not suspended beyond the period allowed by law for the suspension.

As I construe this will, the residue and accumulations,

* 196 * whatever the amount might be, would vest at the death of the survivor of the tenants for life, and there is no suspension therefore of the vesting beyond the period allowed by law. The true question here, as it seems to me, must be, whether a direction to accumulate until a certain sum shall be

produced is void in law (I mean, of course, independently of the Thellusson Act), where the sum accumulated must vest within the period allowed by law ; and I do not think that it is. No case was cited in the argument which has gone to that length, and I see no principle upon which such a direction could be held void ; for, independently of the statute, accumulation might, as I apprehend, be well directed, as long as the vesting might be suspended.

The mischief against which the law as to remoteness is directed is this, that property is rendered inalienable by the suspension of the vesting ; but if the interest be vested this mischief does not exist. Suppose that a fund was directed to be accumulated simply for the benefit of a particular individual until a certain amount was reached which might not be reached within the period allowed by law for the suspension of vesting, it surely could not be said that the disposition was void for remoteness, when the individual might, at any time, stop the accumulation and dispose of the fund ; and if such a disposition would not be void on the ground of remoteness, I do not see how the disposition in this case can be held to be void upon that ground.

The case of *Tregonwell v. Sydenham*, (a) which was referred to in the argument, seems to me to have a very important bearing upon this point ; there a term was created for the purpose of raising, by accumulation of rents, * a sum of * 197 20,000*l.*, to be laid out in the purchase of lands to be settled, and it was held that the term was well created, and the trusts for raising the sums and for the application of them in the purchase of lands were perfectly legal.

The heir in that case was held to be entitled, not in consequence of any invalidity on those trusts, but because the uses declared of the lands to be purchased were too remote. It is upon the invalid disposition of the fund to be accumulated, and not upon the invalidity of the trusts for accumulation, that the decision proceeds.

The case of *Bateman v. Hotchkin* (b) is also, I think, very much in favour of the validity of the residuary dispositions contained in this will. The case of *Curtis v. Lukin*, (c) which was very much relied on by the next of kin, on both the points of remoteness and uncertainty, does not seem to me to apply to this

(a) 3 Dow, 194.

(b) 10 Beav. 426.

(c) 5 Beav. 147.

case; for, as to remoteness, the decision proceeded upon the ground that none of the parties could be said to take vested interests in any ascertained shares of the fund to be accumulated, which was certainly the case, because there was no obligation on the landlord to receive, and therefore no *constat* as to the sum to be paid for the renewal; and as to uncertainty, it seems to me to be a very different question when a lease to be renewed ought to be held to be nearly expiring, and when a sum to be accumulated would amount to about the sum of 3000*l*.

The conclusion, therefore, at which I have arrived in this case is that, independently of the Thellusson Act, the dispositions of this will were valid, and then the consequence, as I apprehend, is

this, — the Act stops the accumulation at the end of the * 198 twenty-one years from the * testator's death, and the income of the then accumulated fund goes to the next of kin until the fund would, if the accumulation had proceeded, have amounted to 3000*l*. or thereabouts, or until the death of the surviving tenant for life, if it should turn out that it would not have amounted to that sum before the happening of that event.

What would be considered to be about 3000*l*. I do not think it necessary for us now to say, for I apprehend that the proper direction will be: subject to the provision as to costs, to pay the income which has accumulated since the expiration of the twenty-one years to the next of kin, and to order the future income to be paid to them until the death of the surviving tenant for life, or until further order, with liberty to apply.

It may turn out that the fund would never have accumulated to any thing like 3000*l*. during the lives of any of the tenants for life, and then no question would arise as to the meaning of the words "or thereabouts."

The costs of the appeal should, I think, be costs in the cause, and the costs of the cause must, I think, be disposed of according to the decision of Lord COTTENHAM in *Erye v. Marsden*. (a)

(a) 4 My. & Cr. 231.

* STACEY v. SPRATLEY.

* 199

1859. May 11. Before the LORDS JUSTICES.

A will executed under very suspicious circumstances by a testator whose testamentary capacity there was reasonable ground for disputing, was established as regarded personal estate by proceedings in the Ecclesiastical Court and before the Judicial Committee; to which H. was a party, as one of the next of kin. After this, at the hearing of a suit instituted by the devisee, H., who was also the heiress-at-law, asked for an issue *devisavit vel non*, which was granted. Further evidence was adduced on both sides, and the jury found in favour of the will.

Held, that, under the circumstances, the asking for an issue was not such vexatious and unreasonable conduct as to make H. liable to pay costs, but that as she had asked for it with full knowledge of the former proceedings, the result of which made it very improbable that she could succeed on the trial, she ought not to receive costs.¹

THIS was a suit to administer the real and personal estates of John Eldridge and Lucy Eldridge. John Eldridge died in 1821, leaving a will, by which he appointed his wife Lucy Eldridge his executrix, and devised and bequeathed to her all his property, real and personal, with a direction that she should devise it at her decease to his four children, as she might deem proper. Two of these children were Mrs. Handley and Thomas Eldridge.

Lucy Eldridge died on the 14th of August, 1854, leaving a will, by which she gave her property, real and personal, to Thomas Eldridge and Mrs. Handley, in equal shares, and appointed them and the defendant Spratley her executors.

Thomas Eldridge died on the 25th of September, 1854, leaving Mrs. Handley his heiress-at-law; and, having made a will, dated 15th December, 1853, by which he gave all his real and personal estate to the plaintiff, whom he appointed his sole executor. The validity of this will was disputed in the Ecclesiastical Court, but the Judge of the Prerogative Court, on the 4th of August, 1856, pronounced in its favour, making, however, no order as to costs. Mrs. Handley was a party to these proceedings as one of the next of kin.

* The present suit was instituted in September, 1856, * 200 against Spratley and Mrs. Handley and her husband, and on

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1148, 1384.

7th March, 1857, a decree was made on motion for the administration of the estates of John and Lucy Eldridge. On this occasion Mrs. Handley applied for an issue *devisavit vel non*, which was refused, and a decree was made which, among other things, directed an account of the rents of the freehold estates of Lucy Eldridge, received by Spratley and by Mrs. Handley and her husband.

On the 25th of June, 1857, an appeal by the next of kin from the decision of the Prerogative Court was disposed of by the judicial committee of the Privy Council, who advised her Majesty to affirm the decision, except as regarded the costs, which they considered ought to be given out of the estate.

On the 14th of January, 1858, an appeal by Mrs. Handley and her husband from part of the decree of Vice-Chancellor STUART came on to be heard, and the Lords Justices decided that they were entitled to an issue, (a) and made an order directing such issue, and suspending the taking the account of rents until after the issue had been tried. At the request of all parties, it was ordered that the further consideration of the cause should be set down to be heard before their Lordships.

The issue was tried before Lord CAMPBELL by a special jury, and on the 14th of June, 1858, a verdict was given in favour of the will. Mrs. Handley, who had not been examined in the former proceedings, was called as a witness on her own
 * 201 behalf, and several witnesses were * called on both sides, who had not previously been examined. The inquiries under the decree were then prosecuted, and the cause now came on for further consideration. The only question in dispute was as to the costs of the issue.

Mr. Malins, Mr. Hislop Clarke, and Mr. Needham, for the plaintiff. — The heiress-at-law ought to be ordered to pay the costs of the issue. The general rule, no doubt, is, that an heir is entitled to have the validity of the will tested by a trial at law, and will have his costs; but the Court has a discretion in the matter, and may refuse him his costs, or even make him pay costs, if his conduct has been vexatious or improper. *Webb v. Claverden*, (b) *Scaife v. Scaife*, (c) *Tatham v. Wright*, (d) *Roberts*

(a) *Supra*, vol. 2, p. 94.

(c) 4 Russ. 309.

(b) 2 Atk. 424.

(d) 2 R. & M. 1.

v. *Kerslake*, (a) *Grove v. Young*. (b) Here the validity of the will, as a will of personalty, had already been conclusively and finally established. The requisites of a will of real estate are the same under the present law as those of a will of personal estate; and though the decision of the judicial committee was not binding on Mrs. Handley, in her capacity of heiress at law, it made her case as to the real quite hopeless, and to ask for an issue under such circumstances was vexatious. Mrs. Handley was not a witness before the Ecclesiastical Court, but she was examined on the trial of the issue, and gave evidence on her own behalf, which, if true, would have been conclusive against the validity of the will. The finding of the jury, therefore, involves the conclusion that her evidence was false. She also set up a case of fraud and constraint, which *she failed to estab- * 202
lish. If she wished for a trial at law, she ought to have asked for one earlier, and not caused the useless expense of the proceedings before the judicial committee. Under these circumstances she ought to pay the costs of the issue.

Mr. Bovill appeared for Mr. Spratley.

Mr. Bacon and *Mr. Godfrey*, for Mr. and Mrs. Handley.—The heiress-at-law ought to have her costs of the issue. The case was one of grave suspicion, and the Judicial Committee considered it such, though they felt bound to come reluctantly to a conclusion that the will was valid. The means of sifting evidence in a trial at law are much superior to those furnished by the Ecclesiastical Courts; and in a case so very suspicious, it was quite natural, reasonable, and proper that the heiress-at-law should wish to have the question tried before the tribunal best suited for such an investigation. The verdict does not in the least involve the conclusion that in the opinion of the jury Mrs. Handley had perjured herself, for it was quite possible that the will should be valid, and at the same time every word of her evidence true.

Mr. Malins, in reply.

THE LORD JUSTICE KNIGHT BRUCE.—When my learned brother

(a) 2 K. & J. 751.

(b) 5 De G. & Sm. 38.

and I directed an issue in this case, we thought that the proceedings might by possibility terminate in an effectual displacement of the will as to real estate, otherwise we should not have directed an issue. As Mrs. Handley was a party to the

* 203 * proceedings in the Ecclesiastical Court and before the judicial committee, only in the character of one of the next of kin, and not as heiress-at-law, she was not in the latter capacity bound by those proceedings. But for the accident that she happened to be one of the next of kin, she would not have been at all concerned in them, and they could not have been alleged to affect her right to an issue. The fact, however, of her having throughout been a party to those proceedings, gave her notice of circumstances which made it very unlikely that she would succeed on the trial of the issue. The formalities required for wills of personal estate being now the same as those required for wills of real estate, the questions tried before the judicial committee were the same as those to be tried on the issue, and the knowledge which Mrs. Handley acquired by her being a party to the proceedings, in which the will was established as a will of personalty, induces me to think that the case is not one in which she ought to have her costs of the issue.

The question, whether she ought to be ordered to pay costs, is very different. Considering that in her character of heiress-at-law she was not bound by the proceedings in the Ecclesiastical Court, and before the judicial committee; considering also (though the will has been established) the strange and suspicious circumstances under which it was executed, the objectionable nature of some of the proceedings which were proved to have taken place, and the flickering and doubtful intellect of the testator, even apart from his habitual drunkenness, we cannot, I think, say that she was wholly unreasonable in expecting to succeed at law. Though she may have set up a case of fraud and constraint, which she has failed to establish, her conduct in that respect is balanced by the indescribable nature of the evidence adduced on the other side.

* 204 * THE LORD JUSTICE TURNER. — The question whether, after the trial of an issue *devisavit vel non*, the heir ought to pay costs or to receive costs, or whether no order should be made as to costs, is one for the discretion of the Court. I agree

that in a case of vexatious and unfounded litigation, the heir-at-law may be charged with the costs of the issue. In deciding the question whether his conduct has been vexatious, great regard must be had to the nature of the contest; and where the Court finds that it has to deal with a document open to the most grave suspicion, it must feel great difficulty in saying that the conduct of the heir in litigating the question has been vexatious. Here, undoubtedly, the document was open to very grave suspicion; and it must be remembered that the means of sifting evidence at common law are far superior to those possessed by the Prerogative Court. New evidence also has been adduced on both sides. Under these circumstances I cannot say that the conduct of the heiress-at-law has been so vexatious that she ought to pay costs. On the other hand, as the question had already been tried and decided by a Court of ultimate jurisdiction, the heiress-at-law must be considered to have taken the issue for her own further satisfaction, and, having failed, she ought not, in my opinion, to receive costs.

* ATTORNEY-GENERAL v. HANMER.

* 205

1859. May 12. Before the LORDS JUSTICES.

Costs cannot be given to a party as against the Crown, except in cases falling within the Statute 18 & 19 Vict. c. 90.

Form of order providing for the costs of a party entitled under that statute to receive them from the Crown.¹

THIS was an appeal by the Attorney-General, from part of an order of Vice-Chancellor STUART dismissing the information. The information was filed against Sir J. Hanmer before the passing of the Act 18 & 19 Vict. c. 90; but some other persons were made parties by amendment after the passing of that Act. The Vice-Chancellor dismissed the information *with costs* as against all the defendants. The Attorney-General appealed from so much of this order as related to costs.

The Solicitor-General (Sir H. M. CAIRNS), *Mr. W. M. James*, and *Mr. Hanson*, for the appeal. — The principal question is as

¹ See 1 Dan. Ch. Pr. (4th Am. ed.) 12.

to the costs of Sir John Hanmer. With respect to the other defendants the matter is merely one of form, for as they were made parties after the passing of the Act 18 & 19 Vict. c. 90, we do not dispute that they are entitled to receive costs. Sir John Hanmer, however, is not entitled to the benefit of the Act, and the question is whether the Court has jurisdiction to give him his costs, which, notwithstanding the late Act, remains an important question; for the Act does not apply to all Crown suits, and it is therefore material to prevent the establishment of a precedent for making the Crown pay costs in cases not provided for by any statute. All the authorities are against the conclusion at which

the Vice-Chancellor has arrived. *Attorney-General v. Lord*
 * 206 *Ashburnham* (a) merely shows * that in charity suits there is
 a modification in favour of the Crown, of the general rule that the Crown neither receives nor pays costs. It is every day's practice at the Rolls to dismiss informations without costs on petition of course by the informant. *Lord Advocate of Scotland v. Lord Dunglass* (b) is precisely in point as to Scotch cases. *Corporation of London v. Attorney-General*, (c) *Lord Advocate of Scotland v. Hamilton*. (d) The Vice-Chancellor relied on *Attorney-General v. Corporation of London*, (e) but it is not in point, —it decided no more than this, that the Attorney-General may receive costs in a case which is of such a nature that if he were a private individual he could in no event be ordered to pay them, as, for instance, where he is a respondent in an appeal.

[THE LORD JUSTICE KNIGHT BRUCE. — There is no such rule here as that a respondent cannot be ordered to pay the costs of an appeal.]

We submit that the jurisdiction to make a respondent to a petition of appeal pay the costs is doubtful; at all events the rule has been generally understood as Lord COTTENHAM lays it down in the case last referred to.

[THE LORD JUSTICE KNIGHT BRUCE. — Such a jurisdiction has been frequently exercised both by the Judicial Committee and by this Court.]

(a) 1 Sim. & Stu. 394.

(d) 1 Macq. 46.

(b) 9 Cl. & Fin. 173.

(e) 2 Mac. & G. 247.

(c) 1 H. L. Cas. 471.

[THE LORD JUSTICE TURNER. — Is there any reported case in which the Attorney-General has been ordered to pay costs.]

We believe there is no case reported or unreported in which it has been done. How can such an order with propriety be made? The Court clearly cannot order the Crown to pay them, and it would be monstrous to make an order for them against the Attorney-General on which he might be attached.

As to the other defendants, we contend that the order * ought to be in the form approved by Vice-Chancellor * 207 WOOD in *Attorney-General v. Mathias* (not reported).

Sir John Hanmer did not appear by counsel.

Mr. E. F. Smith appeared for other defendants, and did not object to the proposed alteration in the form of the order as to their costs.

THE LORD JUSTICE KNIGHT BRUCE. — I should be very glad, if in our opinion we could, to order payment to Sir J. Hanmer of the costs of this suit, but the precedents and the course of the Court seem to us opposed to our doing so.

The Lord Justice TURNER concurred.

The order as to the costs of the other defendants was made in the following form : —

It is ordered that it be referred to the proper taxing master to tax the said costs, and it is ordered that the same when taxed be paid to the defendants, W. E. H., &c., in the manner directed by the Act of Parliament of the 18th and 19th years of the reign of her present Majesty Queen Victoria, c. 90, with liberty for the said last-named defendants, or any of them, to apply to this Court as they may be advised with respect to the said costs.

1859. May 12. Before the LORDS JUSTICES.

When a plaintiff becomes bankrupt or insolvent, if the assignee does not proceed with the suit, the bill will be dismissed without costs, and the common form of order will not be departed from, though the plaintiff has taken steps in the suit without giving notice of the bankruptcy or insolvency, and so led the defendant to incur costs subsequently to and without notice of it.¹

THIS was a motion by the defendant by way of appeal from the Master of the Rolls, who had declined to make an order dismissing the bill with costs.

The bill was filed in December, 1856. In October, 1858, the plaintiff took the benefit of the Act for the Relief of Insolvent Debtors; but the defendant had no notice of this. On 8th December, 1858, the defendant being in a situation so to move in consequence of no replication having been filed, moved to have the bill dismissed for want of prosecution, and the usual order was made for the plaintiff to file replication within three days, and in default thereof for the bill to be dismissed with costs; and the plaintiff was ordered to pay the costs of the motion. The costs of the motion were taxed but not paid, and the replication was filed within the three days. On 5th February, 1859, the time for taking evidence was enlarged for fourteen days on the application of the plaintiff. On the 26th of March, 1859, the defendant again moved to dismiss the bill for want of prosecution; but no order was made, notice having, on the evening before the day on which the motion was made, been served on the defendant, that the plaintiff had become an insolvent debtor, which was the first information the defendant had of the fact. On 15th April the defendant moved that the provisional assignee should make himself a party to the suit, or that the bill should be dismissed with costs. The Master of the Rolls offered to give the defendant an order for the provisional assignee to
 * 209 make himself a party, and that in default thereof the * bill should be dismissed without costs; but the defendant

¹ See 1 Dan. Ch. Pr. (4th Am. ed.) 63, 64, 808, 814.

declined to accept this, and his Honor therefore declined to make any order.

Mr. Lonsdale, for the defendant. — The case of insolvency is analogous to that of bankruptcy, and if the bill is dismissed it should be with costs. *Daniel v. Harding*. (a) The plaintiff here has elected to proceed since his insolvency without giving us notice of it, and he at all events ought to be personally liable for the costs since the insolvency.

Mr. Rogers, for the plaintiff and the provisional assignee. — The provisional assignee intends to proceed with the suit, so that this appeal is in reality frivolous. It is, moreover, ill-founded in point of law, for in all such cases the dismissal is without costs. *Lee v. Lee*. (b) If any order is made it must be the common order, and the defendant ought to pay the costs of bringing us here.

Mr. Lonsdale, in reply. — The observations of Lord COTTENHAM in *Fisher v. Fisher* (c) are in favour of a dismissal with costs. A dismissal without costs is an indulgence, and the conduct of the plaintiff here has been such as to disentitle him to any indulgence.

THE LORD JUSTICE KNIGHT BRUCE. — There is no doubt that, generally speaking, where a * plaintiff becomes bank- * 210 rupt or insolvent, and his assignees decline to proceed with the suit, the course of the Court is that the bill should be dismissed without costs. The present case, however, presents this peculiarity, that the plaintiff has allowed and even forced the defendant to go on incurring costs without giving him any notice of the insolvency. Speaking for myself alone, I think it just that the plaintiff should pay those costs, and I should be disposed to depart to that extent from the common form of order; but, as my learned brother does not think that the circumstances are sufficient to justify a departure from the ordinary rule, the order must go in the common form.

(a) 1 Y. & C. C. C. 436.

(c) 2 Phil. 236.

(b) 1 Hare, 617.

THE LORD JUSTICE TURNER. — I should be very glad if I could concur in an order giving to the defendant, in the event of the dismissal of the bill, his costs incurred since the insolvency ; but I am afraid of the consequences. If we were to introduce the principle of making a distinction as to costs incurred after the bankruptcy or insolvency, and without notice of it, a discussion would arise in almost every case as to whether the defendant had notice. The defendant, however, has, in my opinion, been hardly treated, and ought not to be ordered to pay the costs of the present application.

1859. May 12. Before the Lord Chancellor Lord CHELMSFORD.

Held, that a *caveat* against the enrolment of a decree had not been prosecuted with effect within twenty-eight days by the appellant merely obtaining and serving within that period an order to set down the appeal, but that it ought to have been actually set down, and notice given within the period limited by the order.¹

But where the notice from the records and writs clerks' office only required the obtaining and serving the order to set down the appeal : *Held*, that the appellant, who took those steps only within the period limited, might be considered to have been misled as to the practice, and that the enrolment might as a matter of indulgence be vacated.²

THIS was a motion to vacate the enrolment of a decree on the grounds of irregularity and surprise.

The decree was made on the 21st of December, 1858, and a *caveat* against the enrolment was entered by the defendants on the 22d of December, 1858.

A petition of appeal against the decree was presented by the defendants on the 2d of March, 1859, and the deposit paid on the 4th ; but the appeal was not set down.

On the 29th of March, 1859, the docket for enrolment of the decree was left for signature by the Lord Chancellor, and notice was sent to the defendants from the office of the records and

¹ 2 Dan. Ch. Pr. (4th Am. ed.) 1025.

² 2 Dan. Ch. Pr. (4th Am. ed.) 1026.

writs clerks, that the docket would be presented for signature, unless the defendants lodged their appeal and served an order for setting it down within twenty-eight days.

On the 23d of April the defendants served on the plaintiff an order for setting down the appeal, but the appeal was not set down till the 29th of April, and consequently not till after the expiration of twenty-eight days from the day when the docket was left for signature, the closing of the offices at Easter having prevented it from being set down sooner.

* On the 30th of April the docket was signed by the * 212 Lord Chancellor, and on the 2d of May the enrolment took place.

The question of irregularity turned on the construction of the 4th Order of August 7, 1852, (a) which is as follows: "That where a *caveat* is entered with the proper officer to stay the signing of the docket of the enrolment of any decree, order, or dismissal, such *caveat* shall be prosecuted with effect within twenty-eight days after the docket of such decree, order, or dismissal shall be left to be signed with the proper officer by the party who entered the same, otherwise such *caveat* shall be of no force, and the docket of such decree, order, or dismissal may, immediately after the expiration of the said twenty-eight days, be presented to be signed as if no such *caveat* had been entered."

Mr. Giffard and *Mr. Homersham Cox*, in support of the application. — All that the 4th Order of August, 1852, requires is, that a *caveat* should be prosecuted with effect within twenty-eight days after the docket has been left to be signed with the proper officer by the party who entered the same. Here the *caveat* was prosecuted with effect within the twenty-eight days, and the defendants complied with the notice by serving within that time the order for setting down the appeal. There is no authority to the effect that the appeal must be actually set down within the twenty-eight days. In *Daniell's Chancery Practice* (b) it is said, "One course by which the enrolment may be prevented is by the opposite party taking the necessary steps for a rehearing, for if, previously * to the enrolment being completed, ser- * 213 vice of an order setting down an appeal be served upon the

(a) Order 23, rule 27, of Consolidated Orders.

(b) Page 789 (3d ed.).

party proceeding to enrol, then an enrolment subsequent to such service will be irregular; but neither the mere presentation of a petition of appeal, nor even obtaining the order to set it down, will be sufficient unless service of the order be effected upon the other side." In Mr. Sidney Smith's *Chancery Practice* (a) the practice is thus stated: "If the *caveat* is not prosecuted with effect by serving an order to set down a petition of rehearing or appeal within twenty-eight days after the docket of the decree has been left to be signed and notice thereof given as aforesaid, such *caveat* is of no force." Mr. Ayckbourn's *Chancery Practice* (b) says, "If a *caveat* has been entered, and the party entering it does not present his petition of appeal or rehearing and obtain and serve an order to set the same down within twenty-eight days after the enrolment is presented for signature and notice thereof given to the party entering the *caveat*, the enrolment may, at the expiration of such twenty-eight days, be signed and perfected. To prevent the enrolment it is necessary that the order should be actually served, notice thereof being insufficient."

They also referred to *Robinson v. Newdick*, (c) *Groom v. Stinton*, (d) *Dearman v. Wych*, (e) *Anonymous*, (g) *Kemp v. Squire*. (h)

Mr. Rolt and *Mr. E. R. Turner*, for the plaintiff. — In the authorities it is assumed that the setting down of the * 214 appeal takes place simultaneously with the order * being made for that purpose. This is the first attempt to sever the order to set down the appeal from the actual setting down. The universal practice is to obtain the order and set down the cause simultaneously. Moreover, the general order in force, when the cases relied upon were decided, was that of June 17, 1698, which only directed that the *caveat* should be prosecuted within a month after the docket should be left to be signed, or otherwise that such *caveat* should be of no force, but that the docket might be forthwith presented. The words "prosecuted

(a) Page 469 (6th ed.).

(e) 4 Myl. & Cr. 550.

(b) Page 195 (5th ed.).

(g) 1 Ves. Sen. 326.

(c) 3 Meriv. 13.

(h) 1 Ves. Sen. 205.

(d) 2 Phil. 384.

with effect" are new in the existing order of August, 1852, and must have some force given to them. Prosecution with effect must mean doing all that is requisite to have the cause reheard. The order of 1852 expressly provides, that if the *caveat* be not prosecuted with effect within twenty-eight days it shall be of no force, and that the docket may be presented to be signed as if no such *caveat* had been entered. In the present case the *caveat* had not been prosecuted with any effect whatever.

They referred to *Barnes v. Wilson*, (a) *Mayor of Gloucester v. Wood*, (b) *Church v. Marsh*. (c)

Mr. Giffard was not called on to reply.

THE LORD CHANCELLOR. — This is an application to vacate an enrolment of a decree on the grounds of irregularity and surprise, and the question of irregularity turns on the 4th Order of August 17, 1852. [His Lordship read it.] What is the meaning of the words "prosecuted with effect?" It is *contended, * 215 on behalf of the defendants, that these words are satisfied if the appellant obtains an order to set down the cause to be reheard and serves the order on the respondent. On the other side it is contended, that sufficient is not done unless the appeal is actually set down for hearing, and notice of it being so set down is given to the opposite party. It appears to me that the words are not satisfied by merely obtaining an order for setting down the cause for rehearing and serving that order; and, therefore, if I had to decide the case upon the construction of the order, I should say that the defendants had not brought themselves within the terms of it. But I must look not only to the order, but to the course of practice which has been adopted. The defendants may well have been misled, not only by the authorities which have been referred to, but by the terms of the notice from the records and writs clerks' office, which only intimate that the party lodging the *caveat* must lodge an appeal and serve the order for setting it down within twenty-eight days. I think, therefore, that although they are not entitled to have the order vacated on the ground of irregularity or surprise, I may, as a matter of indulgence, order the enrolment to be vacated.

(a) 1 R. & Myl. 486.

(c) 2 Hare, 652.

(b) 3 Hare, 150.

1859. May 26. Before the LORDS JUSTICES.

A married woman who had obtained a protecting order under 20 & 21 Vict. c. 85, § 21, on the ground of causeless desertion, was made a defendant without her husband to a suit for the administration of the estate of a testator who died after the alleged desertion, giving her a beneficial interest in his property; and a decree was made for accounts and inquiries. Shortly after this, the protecting order was discharged on the application of the husband, on the ground that there had never been any desertion. The plaintiff thereupon obtained a supplemental order under 15 & 16 Vict. c. 86, § 52, to bring the husband before the Court. *Held*, that such an order was proper.¹

Per the Lord Justice TURNER, whether such an order would have been proper if the wife had been the executrix, *quære*.

THIS was an appeal from an order of Vice-Chancellor KINDERSLEY, discharging with costs a supplemental order obtained under 15 & 16 Vict. c. 86, § 52, for bringing before the Court George Bickerton Rudge, the husband of the defendant Elizabeth Grace Rudge.

William Weedon, the father of Mrs. Rudge, died in July, 1858, leaving a very informal will, by which he gave his freehold and leasehold estates and some other property to his wife for life, and after her death to Mrs. Rudge absolutely for her separate use. This gift was so worded as to make its extent very doubtful. He then proceeded to give Mrs. Rudge an annuity of 300*l.* a year for her separate use, without power of anticipation. He then gave to her two daughters 1000*l.* each, with benefit of survivorship, if either died under twenty-one, and unmarried, but if both died under twenty-one and unmarried, the 2000*l.* was to become the property of Mrs. Weedon, if living, if not, it was to go to Mrs. Rudge. Then followed a disposition in favour of the two grandchildren, after their mother's decease, of all the property which had been given to her on the death of Mrs. Weedon, with a clause substituting their issue; and in the event of their having died without issue in Mrs. Rudge's lifetime, there was a gift to the heirs,

¹ See 1 Dan. Ch. Pr. (4th Am. ed.) 87, 178, 179, 181, 538; 2 *ib.* 1526.

executors, or administrators of Mrs. Rudge. The testator then gave his residuary property to Mrs. Weedon, and appointed * her his sole executor. This will was proved by Mrs. * 217 Weedon.

In August, 1858, Mrs. Rudge, who had for many years been living with her parents, and separated from her husband, obtained from a police magistrate an order under the "Act to amend the Law relating to Divorce and Matrimonial Causes in England," 20 & 21 Vict. c. 85, § 21, by which order, after stating that the magistrate was satisfied of the fact of desertion, and of its being without reasonable cause, it was ordered that the earnings of Mrs. Rudge, and all property acquired by her since the commencement of the desertion, which desertion he found to have taken place on the 31st of January, 1843, should belong to Mrs. Rudge, as if she were a *feme sole*, and should be protected from her husband, and all persons claiming under him.

On the 8th of March, 1859, the surviving child of Mrs. Rudge, still an infant, filed her bill by Robert Harris, her next friend, to have the trusts of Mrs. Weedon's will carried into execution. The defendants were Mrs. Weedon and Mrs. Rudge, the latter of whom was made a party to the suit as a *feme sole*, her husband not being joined. On the 12th of March, 1859, a decree was made for accounts and inquiries.

On the 15th of March, 1859, another suit was instituted in the name of the same infant plaintiff by Arthur Jeffery Rudge, her next friend, to which Mrs. Weedon and Mr. and Mrs. Rudge were the defendants.

On the 28th of March, 1859, an application by G. B. Rudge to the magistrate to discharge the order for protection, on the ground that he never had deserted his * wife, was heard, * 218 and the order was discharged, as having been improperly made.

On the 30th of March, 1859, the plaintiff in the first suit obtained, on petition of course at the Rolls, an order under 15 & 16 Vict. c. 86, § 52, that the decree of the 12th of March, 1859, should be carried on and prosecuted against G. B. Rudge and Elizabeth Grace his wife, in like manner as if G. B. Rudge were a defendant in the suit with his said wife.

On the 15th of April, 1859, Vice-Chancellor KINDERSLEY, on motion by G. B. Rudge, discharged the supplemental order with

costs, being of opinion that as the protecting order had been improperly granted, Mrs. Rudge must, after its discharge, be considered to have been throughout in the position of a *feme sole*, and that therefore there had not been any such change or transmission of interest as to bring the case within 15 & 16 Vict. c. 86, § 52. The plaintiff in the first suit now moved to discharge the order of the Vice-Chancellor.

Mr. Glasse and *Mr. Rogers*, for the appeal motion. — By * 219 20 & 21 Vict. c. 85, § 21, (a) the magistrate is to * make the protecting order if he is satisfied as to the fact of desertion, and as to its having taken place without reasonable cause. In the present case he was so satisfied and made the order, which, considering the language of the section, cannot be held to have been irregular or *ultra vires*, though it turned out to be erroneous. The latter part of the same section places a married woman who has obtained a protecting order in precisely the same position as if she had obtained a judicial sentence of separation, and in that case, by § 26, she must be sued alone. We, therefore, could not frame our bill otherwise than we did, for, as the order was undischarged, the husband might have demurred if we had made him a party. The 8th and 10th sections of 21 & 22 Vict. c. 108, show clearly that the legislature intended every thing done by force of such order to be valid, though the order might subsequently be discharged. [*Bathe v.*

(a) “ A wife deserted by her husband may at any time after such desertion, if resident within the metropolitan district, apply to a police magistrate, or if resident in the country, to justices in petty sessions, or in either case to the Court, for an order to protect any money or property she may acquire by her own lawful industry, and property which she may become possessed of, after such desertion, against her husband or his creditors, or any person claiming under him. And such magistrate or justices, or Court, if satisfied of the fact of such desertion, and that the same was without reasonable cause, and that the wife is maintaining herself by her own industry or property, may make and give to the wife an order protecting her earnings and property acquired since the commencement of such desertion, from her husband and all creditors and persons claiming under him, and such earnings and property shall belong to the wife as if she were a *feme sole*. . . . If any such order of protection be made, the wife shall during the continuance thereof be, and be deemed to have been, during such desertion of her, in the like position in all respects with regard to property and contracts, and suing and being sued, as she would be under this act if she obtained a decree of judicial separation.”

Bank of Engand (a) was here referred to.] There has, therefore, been a change of interest by rescinding the order. During its continuance Mrs. Rudge was in the position of a *feme sole*, now she is not. The tendency of the Courts, especially of the Court of Appeal, has been to construe the 52d section of 15 & 16 Vict. c. 86, liberally, and according to the spirit. *Edwards v. Battley*, (b) *Dean and Chapter of Ely v. Gayford*, (c) *Tate v. Leithead*, (d) *Cartwright v. Shepheard*, (e) *Pickford v. Brown*. (g) The present case, if not within *the strict *220 letter, which we submit it is, is at all events within the spirit, of this remedial clause.

Mr. Giffard and *Mr. Simpson*, for G. B. Rudge. — The supplemental order in substance declares that the decree is binding upon the husband, which we submit it is not. The 52d section only applies to cases in which it is necessary to bring before the Court parties who are bound by the proceedings. We submit that there is nothing in the Divorce Acts to make this decree binding on the husband. It would be a most dangerous thing to hold that, after a wife has obtained *ex parte* a protection order, of which her husband knows nothing, he is to be bound by all proceedings in a suit against her.

[THE LORD JUSTICE KNIGHT BRUCE. — Might he not obtain a rehearing?]

We apprehend he might, but that is a very slight protection compared with the power of setting up his own defence. The cases cited as to the effect of the 52d section were all cases in which the property was so far bound that the party brought before the Court had no right to set up a new defence; here the husband, as we submit, ought to be held to have such right. We say, moreover, that the first Divorce Act proceeds on the hypothesis that there has been a desertion, — here there was none, — and the case therefore does not fall within the powers of the Act. The provisions in the second Act, on which the other side rely, only apply

(a) 4 K. & J. 564.

(b) 19 Beav. 457.

(c) 16 Beav. 561.

(d) 9 Hare, App. 51.

(e) 20 Beav. 122.

(g) 1 K. & J. 643.

to cases of contract relating to property coming within the provisions of the first Act.

Mr. Glasse, in reply.

THE LORD JUSTICE KNIGHT BRUCE. — Assuming the order * 221 for protection to have been rightly * discharged, still it was, I apprehend, an order in force when the first bill was filed and when the decree was made. According to what I consider the true construction of the Acts 20 & 21 Vict. c. 85, and 21 & 22 Vict. c. 108, the decree, so far as the absence of the husband is concerned, was right in form and substance ; and when the magistrate's protecting order had been discharged, it was a right and correct course to apply at the Rolls, for the order which was made on the 30th of March last. With deference to the Vice-Chancellor, I think that order also correct in form and substance ; and, considering the nature of the wife's interests which are brought into question in this litigation, I think that the husband ought to pay the costs of his motion before the Vice-Chancellor and the costs of the present application.

THE LORD JUSTICE TURNER. — I also am of opinion that the order made at the Rolls was right. There are two questions in the case, one upon the construction of the Divorce Acts, the other upon the effect of the 52d section of the 15 & 16 Vict. c. 86.

As to the construction of the clauses of the Divorce Acts applicable to the present question, the 21st section of the first Act is as follows : [His Lordship read that section, and then the material parts of the 26th.] Now, what are the circumstances of the present case ? On the 18th of August, 1858, an order was made by a police magistrate giving the wife protection in respect of property acquired by her since the commencement of the desertion ; and this order remained in force till the 28th of March, 1859, on which day it was discharged at the instance of the husband. The husband urges that there never was any desertion, and contends that the Act applies only where the wife has * 222 been actually deserted. * But, looking at the wording of the 21st section, I think that the jurisdiction arises where a woman alleges herself to be deserted, for the Act goes on to

say that the desertion is to be established to the satisfaction of the magistrate, and if he be satisfied, he is to make the order. This, I think, explains the words used in other parts of the section, and I, therefore, read the words "such desertion" in the latter part of it as referring to desertion established to the satisfaction of the magistrate, whether it has really taken place or not. If, then, desertion without cause is established to the satisfaction of the magistrate, and an order for protection made, the wife is placed in the same position as she would be by a judicial separation, and by the 26th section this position is made that of a *feme sole* as regards suing and being sued. The 10th section of the later Act shows what, in the view of the legislature, was the construction of the former Act. [His Lordship here read the 10th section.] This section evidently takes it for granted that, under the prior Act, payments, transfers, and acts made and done under an order while it remained in force would be good, though the order might afterwards be discharged, for it gives validity to payments, transfers, and acts made and done under an order then already discharged, unless the persons dealing with the married woman had notice of its having been discharged. With deference to the Vice-Chancellor, I am, therefore, of opinion that on the true construction of the Divorce Acts this lady was, at the time when the bill was filed, to be treated as a *feme sole*.

This being so, we come to the consideration of 15 & 16 Vict. c. 86, § 52. This section provides, that where a suit becomes defective by reason of some change or transmission of interest or liability, an order to the effect of the usual supplemental decree may be obtained in the * manner there mentioned. * 223 Can it be said that when the protection order was rescinded there was no change of interest? Property which, while the order was in force, was, by virtue of that order, the separate property of the married woman, became subject, upon the discharge of the order, to the rights of her husband. I am of opinion that the supplemental order was right, and that the order of the Vice-Chancellor must be discharged. I do not, however, mean to lay down as a universal rule, that in all cases where an order for protection is discharged the husband can properly be brought before the Court by a supplemental order under this section. There may be cases in which it would not be right to make such an order.

I am not satisfied, for instance, that it would be right to do so if the wife were a party to the suit in the character of executrix.

I have felt some doubt about the costs, but having regard to the nature of the wife's interest in the suit and to the nature of the decree made, I am satisfied that the application to discharge the supplemental order is merely a contrivance to defeat the first suit in order that the conduct of the proceedings for the administration of the estate may be placed in different hands. I agree, therefore, in the opinion of my learned brother, that the husband ought to pay the costs both of the motion before the Vice-Chancellor and of the appeal motion.

1859. May 4, 5, 26. Before the Lord Chancellor Lord CHELMSFORD.

By a receivership deed executed contemporaneously with a mortgage in fee, which it recited, the mortgagor and mortgagee appointed a receiver, and constituted him their agent and attorney to receive the rents of the mortgaged property, and to use such remedies by way of entry and distress as should be requisite for that purpose. By the same deed the mortgagor attorned as tenant from year to year to the receiver, and there was a proviso, that if default should be made in payment of the mortgage-money, or interest, at the times appointed, the mortgagee might enter and avoid the tenancy created by the attornment. There was also a proviso, that nothing therein contained should lessen the rights, powers, or remedies of the mortgagee under the mortgage. On the mortgagor being found bankrupt: *Held*, that the relation of landlord and tenant had been created between the receiver and mortgagor by the receivership deed, and that the receiver was entitled to distrain and take the goods which had belonged to the mortgagor on the mortgaged premises.¹

A receiver distrained under a power accompanying a mortgage, and — the mortgagor being bankrupt, and the proceeds of the distress having been invested, by arrangement, in the names of trustees, to abide the decision of the Court on the rights of the parties — the mortgagee filed a bill against the assignees, and against other defendants who held a bill of sale on the goods taken under the distress, but who by their answer denied that they

¹ See Kerr *Receivers* (1st Am. ed.), 188; *Hampson v. Fellows*, L. R. 6 Eq. 575.

disputed the plaintiff's right to the proceeds, and who disclaimed all interest in them. *Held*, that a decree might be made declaring the assignees entitled to the property, and that the disclaiming defendants were not entitled to an inquiry as to the relative rights of themselves and their co-defendants, the assignees.

THIS was an appeal from the decision of the Master of the Rolls.

The question arose upon a deed dated the 12th of October, 1855, under which the plaintiff claimed the benefit of a distress for 3500*l.* which was made on the goods of Colonel William Petrie Waugh on the 28th of April, 1857, he having become bankrupt on the 15th of April, 1857. The money produced by the sale of the distress had been, by the consent of all parties, paid into a bank to abide the decision of the Court.

The bankrupt Colonel Waugh was the owner of Branksea Island and Castle, in Dorsetshire. The plaintiff was mortgagee of this property. It had been previously mortgaged to other persons, but the plaintiff paid off the prior mortgages; and on the 12th of October, 1855, all the mortgages, amounting to 30,000*l.*, were * vested in him. By an indenture * 225 of that date, the island, castle, lands, tenements, hereditaments, and premises were granted and released to the use of the plaintiff, his heirs and assigns for ever, subject to a proviso for redemption on payment by Colonel Waugh, his heirs, executors, administrators, or assigns, to the plaintiff, his executors, administrators, or assigns, of 30,000*l.*, on the 12th of October, 1856, with interest at 5*l.* per cent.

An indenture, bearing even date with the last-mentioned indenture, was made between Colonel Waugh of the first part, the plaintiff of the second part, Weston Aplin, a defendant, of the third part, and William Carey Faulkner and George Bonnor of the fourth part. It recited the mortgage for 30,000*l.* to the plaintiff, and the covenant for payment of the mortgage money, and then recited as follows: "And whereas it has been agreed that, for securing the regular and punctual payment of the interest of the said sum of 30,000*l.*, and also for providing a fund for better securing the gradual repayment of the principal sum, the said Weston Aplin should be appointed receiver, with the powers and in the manner hereinafter mentioned, of the rents and profits of the hereditaments and premises comprised in the mortgage securities, and that these presents should contain such covenants, clauses,

and provisions as are hereinafter contained. And whereas the said hereditaments and premises are at present in the possession and occupation of the said William Petrie Waugh, and it hath been agreed, that he shall attorn as tenant in respect of the same to the said Weston Aplin at one entire yearly rent of 3500*l.*, part of which, that is to say 1500*l.*, is intended to be by way of securing the punctual payment of the interest on the said mortgage debt, and 2000*l.*, the remaining part thereof, is in-

* 226 tended to be applied in forming * a fund for the ultimate discharge of the principal sum of 30,000*l.*, in manner hereinafter expressed." The witnessing part was as follows:

"Now this indenture witnesseth, that, in pursuance of the agreement, the said William Petrie Waugh and John Jolly do and each of them doth hereby depute, constitute, and appoint Weston Aplin to be receiver, agent, and attorney of William Petrie Waugh and John Jolly and each of them, in the name or names of them or either of them, or otherwise, to ask, demand, or receive of and from all the present and future tenants and occupiers of the said island, castle, lands, tenements, and hereditaments mentioned in the schedules to these presents, all the yearly and other rents, royalties, issues, and profits now due and hereafter to become due for or in respect of the same premises, and in default of payment thereof to use and exercise all such remedies by entry, distress, or otherwise howsoever, and generally to do and perform all such other acts as shall be requisite or expedient for the receiving and recovery of the rents, royalties, issues, and profits."

The deed also witnessed, that Colonel Waugh thereby attorned and became tenant from year to year to Mr. Aplin of such parts of the island, castle, messuages, or tenements, hereditaments, and premises, with the buildings and other appurtenances, as were then held and occupied by Colonel Waugh at the yearly rent of 3500*l.*, by equal half-yearly payments, on the 12th of April and 12th of October in every year, with a proviso that if Colonel Waugh should duly pay and keep down the interest of the mortgage debt, the annual rent should be reduced to 2000*l.* And it was declared that the rents, issues, and profits, when received by Mr. Aplin, should be applied by him, in the first place, in payment of the expenses attending the receipt thereof, and, in the next place, in paying and satisfying to the plaintiff, his execu-

* 227 tors, administrators, * or assigns, the interest to accrue

due in respect of the said sum of 30,000*l.*, or such part thereof as might from time to time remain due under the plaintiff's security, and any sums which he or they should or might have paid for insuring the premises; and, in the next place, in paying the surplus of such rents and profits which should remain after making the aforesaid payments, if the same should not exceed the annual sum of 2000*l.*, or, if the same should exceed that amount, then in paying thereout the annual sum of 2000*l.* to William Carey Faulkner and George Bonnor, or the survivor of them, his executors, administrators, or assigns, upon trust, when and as the same should be paid to them or him, to invest the same in the stocks or funds therein mentioned, and to stand possessed of such stocks or funds upon trust to receive the dividends to accrue thereon, and from time to time to invest the same by way of accumulation, and to stand possessed of the said accumulated fund, and the income thereof, upon trust for securing to the plaintiff, his executors, administrators, or assigns, the principal sum of 30,000*l.*, and the interest thereof, and for that purpose, at any time or times during the continuance of the said mortgage security, to sell any part of the accumulated fund and pay the proceeds thereof to him or them, in or towards payment or discharge of the said mortgage debt, and the interest thereof, and subject thereto to continue the said investments and accumulations until a sufficient fund should be raised for the payment of the said mortgage debt and interest, and all costs, charges, and expenses relating thereto: provided, that when the accumulated fund should amount in value to the sum of 10,000*l.* sterling, or to such a sum as should be equal in amount to the sum remaining due on the security, the trustees should sell the same, and pay the proceeds thereof to the plaintiff, his executors, administrators, or assigns, who should then be bound to * 228 accept the same as far as it would extend in payment and discharge of the mortgage debt, and the interest thereof, and subject thereto, as to any surplus or residue which might remain of the said fund or the proceeds thereof, upon trust for Colonel Waugh, his executors, administrators, and assigns. And the deed contained a proviso that it should not be lawful for Mr. Aplin or any future receiver to act in the execution of his office, unless or until default should be made in payment of the annual sum of 3500*l.*, or some part thereof, but that no such tenant or tenants,

occupier or occupiers, as aforesaid, should be bound to take notice of that proviso. And there was the following proviso: "Nothing herein contained shall lessen or abridge the rights, powers, and remedies of the said John Jolly, his executors, administrators, or assigns, under the recited indentures of mortgage, or prevent him or them from realizing the mortgage security, either by foreclosure, sale, or otherwise."

By an indenture dated the 2d of November, 1855, and made between Colonel Waugh of the one part and the London and Eastern Banking Corporation of the other part, the island, castle, and premises comprised in the plaintiff's mortgage were mortgaged in fee to the London and Eastern Banking Corporation, their successors and assigns for ever, but subject, nevertheless, to the plaintiff's mortgage. By another indenture, dated the 6th of March, 1857, and made between Colonel Waugh of the first part, John Edward Stephens of the second part, the London and Eastern Banking Corporation of the third part, the plaintiff of the fourth part, Mr. Aplin of the fifth part, and William Carey Faulkner and George Bonnor of the sixth part, the premises were charged in favour of the plaintiff with a further sum of 7000*l.*,

* 229 and the London and Eastern Banking Corporation * agreed that the further advance should have precedence over their security.

A bill of sale was, on the 14th of March, 1857, executed by Colonel Waugh in favour of the London and Eastern Banking Corporation.

By an indenture, dated the 9th of April, 1857, and made between the London and Eastern Banking Corporation of the one part, and the defendant Archibald Francis Arbuthnot of the other part, the London and Eastern Banking Corporation transferred, among other things, the above-mentioned mortgage debt to the defendant Arbuthnot, upon trust to get in the same, and pay the amount into the Union Bank to the credit of the corporation.

On the 15th of April, 1857, Colonel Waugh was declared bankrupt, having paid interest on the plaintiff's mortgage down to the 12th of October, 1856; and on the 28th of April, 1857, Mr. Aplin, by the direction of the plaintiff, and as the receiver, appointed by the deed of the 12th of October, 1855, levied a distress upon the goods of Colonel Waugh being then upon the

mortgaged premises, for 3500*l.*, being one year's rent, and seized goods to a value exceeding that amount.

On the 13th of June, 1857, an agreement was signed by Mr. Aplin, acting on behalf of the plaintiff, and by the respective solicitors of the London and Eastern Banking Corporation, and of the assignees of Colonel Waugh, whereby it was agreed, without prejudice to the rights of any party, that the goods thus seized should be sold by auction. The sale took place, and 3500*l.*, part of the proceeds, were paid into the London and Westminster Bank in the joint names of Mr. Coleman, * of the * 230 official assignee, and of Mr. Aplin, as representing the several claimants.

On the 25th of November, 1857, the affairs of the Banking Corporation were ordered to be wound up, and it was afterwards declared bankrupt. (a)

The plaintiff by his amended bill stated to the above effect, and submitted that he was, under the terms of the deed of the 12th of October, 1855, entitled to receive the 3500*l.*, and the interest which had accrued thereon, in part payment of the moneys due to him upon his mortgage securities; but that the official managers of the banking corporation and the assignees of Colonel Waugh respectively disputed the plaintiff's right to that sum, and that the former claimed to be entitled to receive it under the bill of sale, and the latter on the ground of the bill of sale being an act of bankruptcy, or on that of the goods having been in the bankrupt's reputed ownership.

The prayer was, that it might be declared that the plaintiff was entitled to the 3500*l.* and all interest which had accrued or should accrue due thereon, in part discharge of his mortgage debt, and the interest thereof, and that Mr. Aplin and the assignees might be ordered to pay over the same sum, and the interest thereof, to the plaintiff accordingly. That an account might be taken of what was due to the plaintiff for principal and interest upon his said mortgage securities. That the defendants might pay to the plaintiff the amount which should be so found due, with his costs, by a short day, or might be foreclosed.

The defendants, the assignees, by their answer, claimed to be entitled to the 3500*l.* The official managers of the London and Eastern Banking Corporation admitted, * by their * 231

(a) See 2 De G. & J. 484.

answer, that the goods in question had been assigned to the corporation to secure 80,000*l*. They submitted to the Court whether the bill of sale was an act of bankruptcy, and whether the goods were in the reputed ownership of Colonel Waugh at his bankruptcy, but they denied that they did dispute, or had ever disputed, the plaintiff's right to the sum of money in question in the suit, and they disclaimed all interest in it. The pleading was in the heading merely described as the answer of the defendants, and not as their answer and disclaimer.

The Master of the Rolls held, that the relation of landlord and tenant did not exist between the bankrupt and the receiver, and that as the receivership deed recited the true state of the title, it could not by estoppel constitute that relation for the purposes of the suit. His Honor also held that the power to distrain was a power which could not be exercised as against the assignees, as it only extended to goods belonging to the bankrupt at the time of the distress, and his Honor consequently declared that the assignees were entitled to the fund. His Honor also held that the defendants, representing the Banking Corporation, after disclaiming all interest, could not resist this decision being made, and were not entitled to an inquiry as to the respective rights of themselves and the assignees of Colonel Waugh.

From this decision there were two appeals, one of the plaintiff and the other that of the official managers of the London and Eastern Banking Corporation.

Mr. R. Palmer, Mr. Bevir, and Mr. Quain, in support of the plaintiff's appeal. — The Master of the Rolls held that there was no tenancy created by way of estoppel as there was in *Dancer v.*

Hastings, (a) on the ground that in the present case the
 * 232 * recitals of the receivership deed showed the exact nature of the title, which his Honor thought inconsistent with the supposition that the relation of landlord and tenant existed between the receiver and the mortgagor. But we submit that upon this deed the parties, and those claiming under them, are as much estopped as the parties were in *Dancer v. Hastings* from disputing the existence of the relation of landlord and tenant between them. The receiver in this case is in the same position as a receiver appointed by the Court of Chancery, whose right to

(a) 4 Bing. 2 ; 12 Moore, 34.

distrain has been well settled. *Pitt v. Snowden*, (a) *Hughes v. Hughes*, (b) *Wilkinson v. Colly*, (c) *Doe v. Read*, (d) *Bennett v. Robins*. (e) In *Chapman v. Beecham*, (g) a vendor covenanted to convey to the purchaser on payment of the purchase-money, and it was by the same deed agreed that the vendor might distrain for interest on the purchase-money. This was held quite sufficient to give a legal power of distress even if the agreement merely amounted to leave and license. In *Pinhorn v. Souster*, (h) where the mortgagor was by the mortgage declared to be tenant at will to the mortgagee at a rent, it was held that the mortgagee might distrain. It is enough for there to be words purporting to create a tenancy although no legal estate may actually appear to vest in the person authorized to distrain. If the power to distrain had been given to the plaintiff, there could have been no question as to its validity after and notwithstanding the bankruptcy of the mortgagor. But the intention is clearly the same, and the receiver is the agent for the plaintiff for that purpose. The plaintiff assented to the mortgagor attorning to the receiver, and that was sufficient. A mortgagor left in possession may distrain *in the name and as the bailiff of the mortgagee. * 233 *Trent v. Hunt*. (i) A receiver appointed by both may surely exercise the same right. It would, as was said by Baron PARKE in *Pinhorn v. Souster*, (k) shake numerous securities throughout the country to throw a doubt on deeds of this description, which are universally adopted. Martin's Conveyancing, by Davidson, Wright, and Waley, (l) Jarman's Bythewood. (m)

They also referred to and commented upon *Walker v. Giles*, (n) *West v. Fritche*, (o) *Doe v. Olley*, (p) *Doe v. Tom*, (q) *Freeman v. Edwards*, (r) *Doe v. Davis*, (s) Shepherd's Touchstone. (t)

(a) 3 Atk. 750.

(b) 3 Bro. C. C. 87; 1 Ves. Jr. 161.

(c) 3 Burr. 2694.

(d) 12 East, 57.

(e) 5 C. & P. 379.

(g) 3 Q. B. 723.

(h) 8 Exch. 763.

(i) 9 Exch. 14.

(k) 8 Exch. 769.

(l) Vol. 2, p. 571.

(m) Vol. 6, p. 346 (3d ed. by Sweet).

(n) 6 C. B. 662.

(o) 3 Exch. 216.

(p) 12 A. & E. 481.

(q) 4 Q. B. 615.

(r) 2 Exch. 732.

(s) 7 Exch. 89.

(t) Page 81.

Mr. Selwyn, Mr. Giffard, and Mr. Joseph Brown, for the assignees of Colonel Waugh. — *Dancer v. Hastings* was decided on the ground of estoppel, which does not apply here, as the deed shows on the face of it that the receiver had no right to distrain. There is no demise to the mortgagor from the receiver or from any other person, nor has the receiver any reversion. *Doe v. Davis* (a) shows that the possession of a mortgagee is one at will only, notwithstanding a stipulation as to the payment of rent; and *Freeman v. Edwards* (b) is a conclusive authority that the rent cannot be treated as a rent-charge, such a charge being incapable of co-existing in the same person as the fee-simple in possession. In *Ward v. Shew* (c) it was held that an authority from a bankrupt's assignees to his tenants to pay their rents to him did not authorize him to distrain. With respect to the practice of conveyancers, which is relied upon, the purpose for which receivership deeds are executed is to exempt a mortgagee from the necessity of accounting to the mortgagor as mortgagee in possession, and from being answerable for what he might receive but for his wilful default. A mortgagee once in possession is always in possession, and it is in order to escape from the responsibility of such a position and to leave the possession in the mortgagor that these instruments are executed. They afford some further security to the mortgagee, but are never supposed to give the mortgagee all the benefit without any of the burdens of taking possession. The receiver is the agent of the mortgagor, and the mortgagee is exempt from all responsibility as to the conduct of receiver. But the result is, that when the mortgagor becomes bankrupt, the agency is at an end, and the agent can no longer distrain. At all events, the distress was for too large an amount, interest having been paid down to the 12th of October, 1856.

They referred to *Thomas v. Brigstocke*, (d) *Williams v. Price*, (e) *Saffery v. Ellgood*, (g) *Johnson v. Faulkner*, (h) *Cornish v. Searell*, (i) *Shepherd's Touchstone*, (k) *Webb v. Russell*, (l)

(a) 7 Exch. 89.

(b) 2 Exch. 732.

(c) 9 Bing. 608.

(d) 4 Russ. 64.

(e) 1 Sim. & Stu. 581.

(g) 1 Ad. & El. 191.

(h) 2 Q. B. 925.

(i) 8 B. & C. 471.

(k) Page 243.

(l) 3 T. R. 393.

Stokes v. Russell, (a) Frontin v. Small, (b) Pargeter v. Harris, (c) Right v. Bucknell. (d)

Mr. Follett and Mr. Tyndall, for the defendants representing the London and Eastern Banking Corporation.

* *Mr. Rodwell, Mr. Hetherington, Mr. Dickinson, and Mr. Goren*, for other parties. * 235

Mr. R. Palmer, in reply.

Judgment reserved.

May 26.

The Lord Chancellor (after stating the facts and reading the receivership deed) said : —

The first point to be ascertained is, what were the intention and object of the parties to be collected from the language of the deed.

It is quite evident that their object was to secure the punctual payment of the interest of the mortgage, and to provide for the gradual reduction of the principal sum. This they intended to accomplish by means of a tenancy, which was to be created between Colonel Waugh and Aplin. That this was their intention appears clearly by the recital that it had been agreed that Waugh should attorn as tenant to Aplin, by the clause of attornment itself, by which Waugh attorned and became tenant from year to year to Aplin, and by the proviso for re-entry, by which it was provided that, upon the plaintiff's entry on the premises whereof Waugh had attorned tenant, the tenancy created by the attornment should absolutely cease and determine.

There being, therefore, no doubt what the parties meant to do, it is next to be considered whether there is any legal objection to the means which they adopted for carrying out their intention. For this purpose it will be necessary to bear in mind the nature of the relation which exists between a mortgagor and a mortgagee at law. A mortgagor who remains in possession after the

(a) 3 T. R. 678.

(b) 2 Ld. Raym. 1418.

(c) 7 Q. B. 708.

(d) 2 B. & A. 278.

* 236 execution * of a mortgage, and continues to enjoy the profits of the land, is not considered as a tenant from year to year to the mortgagee, nor even as a tenant at will; he receives the profits for his own use, and not as agent or bailiff of the mortgagee, and when he has once received them he is absolutely entitled to keep them as his own. *Per* ALDERSON, B., *Trent v. Hunt* (a).¹ But he may at any time be treated as a trespasser by the mortgagee, who may maintain ejectment against him without any previous notice or demand of possession.² Such being the precarious dependence of a mortgagor upon the will of the mortgagee, it is competent to them to enter into an agreement by which the mortgagor's possession may be rendered more secure by the creation of a tenancy. This is sometimes effected by a stipulation in the mortgage deed itself. Thus in *West v. Fritche*, (b) a mortgage deed which was executed by the mortgagor, only contained a clause by which, for the more effectual recovery of the interest, the mortgagor attorned and became tenant to the mortgagee at the yearly rent of 40*l.*, payable half-yearly, so long as the principal sum remained secured. The mortgagor having remained in possession and made several of these half-yearly payments, the Court of Exchequer held that the subsequent occupation connected with the covenant constituted the relation of landlord and tenant, so that the mortgagee could distrain. So in *Doe d. Garrod v. Olley*, (c) it was agreed that the mortgagor, during his occupation of the mortgaged premises, should pay the mortgagee the yearly rent or sum of 50*l.* half-yearly, and that it should be lawful for the mortgagee to use such remedies by distress and sale for the recovery of the rent as landlords have in common demises, provided that the reservation of such

* 237 rent should not prejudice the mortgagee's * right to enter and evict the mortgagor at any time after default made in

(a) 9 Exch. 22.

(b) 3 Exch. 216.

(c) 12 Ad. & El. 481.

¹ See *Fitchburg Manuf. Corp. v. Melven*, 15 Mass. 268; *Gibson v. Farley*, 16 Mass. 280; *Boston Bank v. Reed*, 8 Pick. 459; *Wilder v. Houghton*, 1 Pick. 87; *Mayo v. Fletcher*, 14 Pick. 533; *Field v. Swan*, 10 Met. 112; *Smith v. Moore*, 11 N. H. 55, 62; *Hapgood v. Blood*, 11 Gray, 400; 4 Kent 155-157, 164, 165.

² See *Colman v. Packard*, 16 Mass. 39; *Lackey v. Holbrook*, 11 Met. 458; *Reed v. Davis*, 4 Pick. 216; *Page v. Robinson*, 10 Cush. 102; *Hapgood v. Blood*, 11 Gray, 400; 4 Kent, 154, 155, 164; *Kerr Receivers* (1st Am. ed.), 36, 37, in note (1).

payment of the moneys secured or any part thereof. The Court of Queen's Bench appear to have been of opinion that there was a tenancy created with which the power of distress was connected, but they decided the case upon the proviso for entry and eviction of the mortgagor, which they held not to be waived by the proceeding for recovery of the rent by distress. And this case was confirmed and acted upon in *Doe d. Snell v. Tom*, (a) where in the mortgage deed the mortgagor attorned as tenant to the mortgagee at a quarterly rent, and there was also a power of entry in default of payment. And the same law was also laid down by the Court of Exchequer in *Pinhorn v. Souster*. (b) Of course it can make no difference whether agreements of this description between mortgagor and mortgagees are contained in the mortgage deed itself or in a separate deed, and if Colonel Waugh had, in the deed of the 12th October, 1855, attorned as tenant to the plaintiff instead of Aplin, there could have been no doubt that the relation of landlord and tenant could have been established between them.

But it is contended that the attornment to Aplin had no operation: not by agreement, because he had no interest in the land to which it could apply; nor by estoppel, because the deed sets forth the rights and interests of all parties, and shows that Aplin had no reversion in the premises to which the power of distress could be incident. It appears to me, however, that the circumstance of the truth of the case appearing upon the deed is a reason why the agreement of the parties which it embodies should be carried out, either by giving effect to their intentions in the manner which they have prescribed, or by * way of estoppel to prevent their denying the right to do * 238 the acts which they have authorized to be done. If attornment to a mortgagee would be good to create a tenancy in the mortgagor (which seems to be provided for by the 11th Geo. 2, c. 19), why should not an attornment to a third person, with the consent of the mortgagee, operate either to create a tenancy or to estop all parties from denying that such a tenancy exists. The statement in the deed of the character with which Aplin was to be clothed in order to carry out the object of the parties, and the proof which it affords of his having no previous

(a) 4 Q. B. 615.

(b) 8 Exch. 763.

title to the land, appears to me to furnish no objection to the validity of the distress in question.

In *Cornish v. Searell* (a) an instrument, by which the tenant of premises attorned and became the tenant to the plaintiff, described as "two of the sequestrators named in the suit in chancery to hold the same for such term and on such conditions as may be subsequently agreed upon," was held to amount to an agreement for a tenancy. And in *Dancer v. Hastings* a demise by a receiver appointed by the Court of Chancery was determined to be a good lease to entitle the lessor to distrain and to estop the lessee from pleading non-tenant.

The Master of the Rolls, however, distinguished the case of *Dancer v. Hastings* from the present by observing that in that case "the person distrained on had accepted a lease from the receiver of the Court of Chancery *simpliciter*, and the Court of Common Pleas held that he could not afterwards say that the receiver had not demised the land to him;" but his Honor added:

"here Colonel Waugh has attorned to the receiver, but * 239 he has done so under the deed which sets * forth and explains the rights and interests of all parties, and by so doing it shows that the relation of landlord and tenant did not actually subsist between Colonel Waugh and Aplin." And again, adverting to the difference between the deed in *Dancer v. Hastings*, and the deed creating the right to distrain in the present case, his Honor says: "the deed in that case must be inferred from the case itself to have been a simple demise from one person as owner to another as tenant. The deed is not set out, but I infer that must have been so from the terms of the case. But here the recitals and covenants contained in the deed show that the real owner at law was the plaintiff, and in equity Colonel Waugh's right was subject to the mortgage vested in the plaintiff." His Honor's attention seems to have been directed solely to the report of the case of *Dancer v. Hastings* in the fourth volume of Bingham's Reports. (b) Had the contemporaneous report of it in 12 Moore (c) been brought to his notice, he would have found that the lease was not merely (as he might naturally be led to suppose from the statements in Bingham) a simple demise from one person as owner to another as tenant,

(a) 8 B. & C. 471.

(b) Page 2.

(c) Page 34.

but that it set out the title of the lessor as receiver appointed by the Court of Chancery, and made the rent payable to the lessor or any future receiver or receivers, showing thereby most clearly that the lessor had no interest in the land. What effect this corrected view of the character of the lease in *Dancer v. Hastings* might have had on his Honor's judgment it is of course impossible for me to conjecture, but if that case is good law (and I am not aware that it has ever been questioned), it does seem to be a strong authority in favour of the establishment of a tenancy in this case, notwithstanding the deed sets forth and explains the rights and interests * of all parties. Of course if a * 240 tenancy were created, the right to distrain would follow as an incident to it.

But, it is said, there can be no power to distrain, because Aplin had no reversion to which it could belong, and cases were cited such as *Preece v. Corrie*, (a) — *v. Cooper*, (b) and *Pascoe v. Pascoe*, (c) to show that where a lessee parts with his whole interest upon payment of a rent, he cannot distrain, because he has no reversion. There may possibly, however, be a difference between those cases and the present, where a person attorns or acknowledges himself to be tenant to another, as in this latter case it may be considered that the law which estops him from denying the tenancy, may also prevent his disputing that a reversion exists in his landlord. But it is unnecessary to press this distinction (if it exists) in the present case. In the cases cited upon this point there was no express right to distrain reserved or created. This seems to have been so in *Preece v. Corrie*. (a) In — *v. Cooper*, (b) it is stated that in the assignment there was no clause of distress, and in *Pascoe v. Pascoe*, (c) although the whole of the original lessee's term and interest in the premises were transferred, yet no doubt was suggested that a power of distress might have been given, the only question being whether the reference to the arbitrator gave him authority to confer that power.

In the deed in question in this case, the remedy by distress is expressly conferred upon Aplin, and therefore, even if the creation of the tenancy did not admit the *scintilla* of a reversion to which the right of distress might * be incident, * 241

(a) 5 Bing. 24.

(c) 3 Bing. N. C. 898.

(b) 2 Wils. 375.

yet there seems to be nothing to prevent the power being exercised where it is given in express terms, although there may be no reversion in the person to whom another attorns as tenant.

It may perhaps be right to take some notice of other views of the case which were brought forward in the course of the argument. It was suggested, that if the deed was not sufficient to create a tenancy, yet that it might amount to a grant of a rent-charge. This, however, cannot be, because Colonel Waugh had no estate in him out of which such a rent could arise. It is only necessary to mention in support of this view the cases of *Doe d. Garrod v. Olley*, (a) *per* PATTESON, J., and *Freeman v. Edwards*. (b)

It was also contended, that, if no tenancy was created between Colonel Waugh and Aplin, at least one was established between Colonel Waugh and the plaintiff, and it was compared to the case of a demise by a *cestui que trust*, of which the trustee was at liberty to claim the benefit, and to treat the *cestui que trust* as his agent, as in *Vallance v. Savage*. (c) And I observe that the Master of the Rolls says: "The deed shows that the relation of landlord and tenant existed (if at all) between the plaintiff and Colonel Waugh." But if no tenancy exists between Colonel Waugh and Aplin, I cannot see how any can be established between him and the plaintiff. In *Vallance v. Savage*, (c) the trustee was no party to the lease. Here it was the intention of all parties that a tenancy should be created between Colonel

Waugh and Aplin. If this fails of effect for any reason, how
 * 242 can a different tenancy be presumed, which is not * only
 not in accordance with, but directly contrary to, such intention?

I am therefore of opinion that the validity of the distress depends entirely upon the existence of a tenancy to Aplin, — that this is created in pursuance of the intention of all the parties by the attornment of Colonel Waugh as tenant to him with the consent of the plaintiff, that the express power of distress is not what may be termed a power in gross, but one annexed to the tenancy, and that the distress made is valid, and entitles the plaintiff to the produce of it.

It is stated, on the part of the defendants, that the interest

(a) 12 Ad. & El. 487.

(c) 5 Moo. & P. 576.

(b) 2 Exch. 732.

upon the mortgage having been paid down to the 12th of October, 1856, the distress for a year's rent was far too much, as there could only be half a year's due. But the effect of the payment of interest was merely to reduce the rent from 3500*l.* to 2000*l.*, so long as the interest was duly and punctually paid, and is not to be taken as actual payment of rent. There may therefore have been a year's rent due from the preceding 28th of April down to the time of the distress, though during the half-year ending on the 28th of October, 1856, only at the rate of 2000*l.*, on account of the punctual payment of interest to that period, and for the subsequent half-year at the full rent of 3500*l.* This would make the year's rent due under the deed 2750*l.* instead of 3500*l.*, the amount distrained for. This sum, I think, the plaintiff is entitled to out of the proceeds of the distress.

The decree, therefore, of the Master of the Rolls must be varied, so far as it declares that the official assignee and the creditors' assignees of Colonel Waugh are entitled to the sum of 3500*l.* and the interest which * has accrued upon it, and * 243 directs the payment of that sum and interest to them; and also as to the order to pay to the official assignees and the creditors' assignees so much of their costs as have been occasioned by the plaintiff's claim to the said sum of 3500*l.* and interest. And it must be declared that the plaintiff is entitled to the sum of 2750*l.* out of the 3500*l.* standing in the joint names of the defendants James Edward Coleman, William Bell, and Weston Aplin in the London and Westminster Bank, and all interest which has accrued or shall accrue due upon the said sum of 2750*l.*; and that the defendants James Edward Coleman, William Bell, and Weston Aplin do, on or before a specified day, pay to the plaintiff the sum of 2750*l.* and interest.

If the plaintiff has paid the costs to the official assignee and the creditors' assignees, they must be repaid.

Appeal allowed, but without costs.

The other appeal, that of the defendants representing the London and Eastern Banking Corporation, was then brought on.

Mr. Follett and *Mr. Tyndall*, in support of the appeal.—The decree was erroneous in making any declaration concerning the rights of the assignees as against their co-defendants, the parties

representing the London and Eastern Banking Corporation. The latter defendants answered, and disclaimed as between themselves and the plaintiff, but they did not disclaim as between * 244 themselves * and the assignees. On the contrary, they submitted the questions, as to the bill of sale being an act of bankruptcy, and as to reputed ownership, on which the title of the assignees depends, to the Court. The answer of these defendants is intituled "answer" only, and not "answer and disclaimer," nor is it indeed a pure disclaimer. It is merely an admission of the plaintiff's title. If the 3500*l.* had been in form as well as substance the only subject of the suit, all that the Court could have done, according to the view of the law taken by the Master of the Rolls, would have been to dismiss the bill. It could not have decided which of the defendants was entitled to the 3500*l.*, if the plaintiff was not entitled to it. At all events, before making any declaration, there should have been an inquiry in Chambers, in which the co-defendants might have an opportunity of contesting each other's claims. And as there is a sum of 750*l.*, part of the amount in dispute, to which the plaintiff is still held not entitled, such an inquiry should now be directed.

They referred to *Cooté v. Low*, (a) *Cottingham v. Earl of Shrewsbury*, (b) *Chamley v. Dunsany*, (c) *Chervet v. Jones*, (d) and *Merlin v. Blagrove*. (e)

Mr. Selwyn, *Mr. Giffard*, and *Mr. J. Brown* were not called upon.

THE LORD CHANCELLOR.—This is an appeal from a decree of his Honor, the Master of the Rolls, on the ground that he has erroneously decided, that the assignees are entitled to a sum of * 245 3500*l.* which was in dispute in the case, the counsel * who represent the London and Eastern Banking Corporation, insisting on their behalf, that they are by the decree unjustly precluded from setting up a claim against the assignees, their co-defendants, and that the decree, which ought to have been pronounced by his Honor the Master of the Rolls entertaining the

(a) 1 Moll. 31.

(b) 3 Hare, 627.

(c) 2 Sch. & Lef. 690, 709.

(d) 6 Mad. 267.

(e) 25 Beav. 125.

view which his Honor took of the plaintiff's claim was simply a decree dismissing the bill with costs.

It appears to me, however, that this appeal is not well founded. There is no doubt that the rights of co-defendants cannot be decided except in cases where either it is necessary to decide those rights, in order to determine the right of the plaintiff himself, or where those rights are established by such clear and satisfactory evidence, that the Court is convinced that no further evidence can be produced by the defendants in any subsequent proceedings, so that the case is entirely ripe for decision between the co-defendants, as well as for deciding the right of the plaintiff in the suit.¹ The present suit was virtually one instituted for the purpose of deciding the right of the plaintiff to a sum of 3500*l.*, part of the proceeds of a distress which had been put in by him on the goods of Colonel Waugh, who had become bankrupt. The assignees claim to be entitled to that 3500*l.*, and the London and Eastern Bank also claim under a bill of sale which had been given by Colonel Waugh to them for a very large sum of money due from him to them. It was arranged that this sum of 3500*l.* should be paid into the London and Westminster Bank, in the names of certain persons who were to represent those who claimed to have an interest in the money ; Mr. Coleman representing the London and Eastern Banking Corporation, Mr. Bell the assignees of the bankrupt, and Mr. Aplin the party who made the distress, — in fact, Mr. Jolly the plaintiff.

* The claim which was made by the bill, and the rights * 246 of the parties stated in it, were these : The plaintiff, under the terms of the indenture of the 12th of October, 1855, claimed to be entitled to receive the sum of 3500*l.* and the interest which has accrued due thereon, in part payment of the moneys due to him upon his mortgage. The official managers of the banking corporation, and the defendants Bell, Hughes, Jay, and Pearce, disputed the plaintiff's right to the money ; the official managers claiming the money under the alleged bill of sale, and the other defendants claiming it as assignees of Colonel Waugh, and as part of his estate, on the ground that the alleged bill of sale was an act of bankruptcy on the part of Colonel Waugh, and that the goods were in his order and disposition at the time of his bankruptcy. I consider, therefore, that the suit was really instituted

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1370.

for the purpose of determining who was the person entitled to the proceeds of the distress to the extent of the sum of 3500*l*.

The defendants, the official managers of the London and Eastern Bank, put in their answer. By that answer they, as it appears to me, most distinctly and clearly disclaimed all right and interest in the subject-matter of the suit. It is impossible to read the paragraph of their answer, to which reference has been made, without coming to that conclusion. They say, "We deny it to be true that we these defendants, or either of us, dispute or have ever disputed the plaintiff's right to the said sum of money in question in this suit;" thus admitting that the right to the 3500*l*.

was the real question in dispute. They might have stopped there, and if they had chosen to frame their answer merely with an admission of the plaintiff's right to the money, or a statement that they did not dispute his right, there might have been

* 247 some ground for the arguments which have * been addressed to me on the part of the defendants, who represent the London and Eastern Bank. But they go on and say, "Or that we claim or have ever claimed to be entitled to receive the same under the said bill of sale or otherwise; and we disclaim all right, interest, and claim to the said sum of money, and we claim to be dismissed this suit with costs." Does that or does it not amount to a disclaimer? *Mr. Follett* has said that the ordinary form of a disclaimer, where it is an answer and disclaimer, has a particular heading, such as "The answer and disclaimer." But I put the question to him, whether, supposing an answer and disclaimer was put in without that heading, which he says is necessary, and there had been in the body of the answer a distinct and positive disclaimer, that would be insufficient, upon the ground of the want of what he calls the proper heading? As I understand the answer he gave me, he was compelled to admit that a disclaimer in those terms, although not pointed to by the heading of the answer, would be perfectly sufficient. It was admitted by *Mr. Follett* that the answer might have been framed in this way: "We do not dispute the plaintiff's right to the sum of money, nor do we claim to receive the same under the bill of sale, except in the event of its being decided that the plaintiff is not entitled to the fund." The defendants might have put in an answer of that kind. They have not, however, chosen to do so, but have, in the most distinct terms, stated that they have no interest, that

they disclaim all right, interest, and claim to the said sum of money. This cannot be confined to a disclaimer, so far as the plaintiff's interests are concerned, but is a most general and unqualified disclaimer of any right whatever in that sum of money, which is the subject-matter of the suit.¹

It is quite true that upon the notice which has been * given it was not competent to the assignees to have read * 248 the answer of the defendants representing the London and Eastern Banking Corporation, but the matter was before the Master of the Rolls, and that answer was brought to his notice by the plaintiff, and his Honor found that persons who had been made defendants in the cause, and who were supposed to assert a right to the sum of money, which was the only subject-matter of dispute, positively disclaimed by their answer any right to that sum of money.

It is however said, that as these defendants were not dismissed, as they ought to have been at once by the Court upon their disclaimer, it was the duty of the Master of the Rolls to have taken care of their interests; at all events, so far as to have made a decree, which would have left it open to these defendants to discuss and dispute their rights as between themselves and the assignees of the bankrupt. But I apprehend that, although they were not technically dismissed from the suit, they were virtually no longer parties to it. They had waived all their right to claim any interest whatever in that which was the subject of discussion, and which was to be decided by the Court; and therefore it appears to me that the Master of the Rolls had no other course to pursue than to decide the matter as it then stood between the only persons, who were the litigant parties, as between themselves. When the London and Eastern Banking Corporation withdrew all claim, and thus excluded themselves from all interest in the subject-matter of the suit, the only litigant parties who remained were the plaintiff on the one hand, and the assignees on the other. It appears to me, under these circumstances, that the suit was just in the same position as it would have been in if originally they had been the only parties to it, and that the Master of the Rolls could only regard the * rights and * 249 interests of those parties as between themselves. The Court had nothing to do with any claim or any right which might

¹ See 1 Dan. Ch. Pr. (4th Am. ed.) 707, 708.

possibly have existed on the part of the other defendants to dispute the question with the assignees of the bankrupt. Therefore it appears to me that when his Honor decided the question as between plaintiff and the assignees, his Honor made the only decision that it was possible for him in that respect to make.

Under these circumstances, if the defendants have unfortunately taken a course by which, as it is said upon the form of the decree, either as it now stands or as it is to be varied, they will be precluded from asserting any right, which they are entitled to assert to the 750*l.*, being the surplus of the 3500*l.*, all that can be said upon the matter is, that since they have chosen to disclaim in the distinct manner in which they have done so, I ought not (even supposing them to be excluded by the decree) to interfere in any way to assist them to open the question as between them and the assignees.

I think, therefore, that this appeal must be dismissed with costs, and the decree, so far as regards 750*l.*, part of 3500*l.*, will remain.

1859. May 10, 11, 12, 26. Before the Lord Chancellor Lord CHELMSFORD.

For the purpose of reforming an instrument, clear and unambiguous evidence must be produced, not merely showing a mistake, but showing the deed in its proposed state to be in conformity with the intention of all the parties at the very time of its execution,¹ and a denial by one of the parties that

¹ See *Walker v. Armstrong*, 8 De G., M. & G. 531, note (1); *Sawyer v. Hovey*, 3 Allen, 331; *Andrews v. Essex Ins. Co.*, 3 Mason, 10; *Green v. Morris*, 1 Beasley (N. J.), 170; *Durant v. Bacot*, 2 Beasley (N. J.), 201; *Canedy v. Marcy*, 13 Gray, 373; *Stockbridge Iron Co. v. Hudson River Iron Co.*, 102 Mass. 48; *Nevius v. Dunlap*, 33 N. Y. 676; *Shay v. Pettes*, 35 Ill. 360; *Harris v. Pepperell*, Q. B. 5 Eq. 1; *Earl of Bedford v. Earl of Romney*, 30 Beav. 431; *Garrard v. Frankel*, 30 Beav. 445; *Schettiger v. Hopple*, 3 Grant's Cas. 54; *Brown v. Lamphear*, 35 Vt. 252; *Fry Specif. Perf.* (Am. ed.) 310, § 500 *et seq.*; *White v. Williams*, 48 Barb. 222; *Smith v. Mackin*, 4 Lansing (N. Y.), 41; 1 Sugden V. & P. (8th Am. ed.) 160, note (r), and cases cited, 171 and cases cited in notes (b), (b'); *Conover v. Wardell*, 7 C. E. Green (N. J.), 492; *Rooke v. Lord Kensington*, 2 K. & J. 753; *Sells v. Sells*, 1 Dr. & Sm. 42; *Eaton v. Bennett*, 34 Beav. 196; *Fallon v. Robins*, 16 Ir. Ch. 422;

the deed as it stands was not according to his intention at the time ought to have considerable weight.²

A deed of compromise between a mother and son recited a letter of the mother's (who was a widow), written before the son's marriage, stating that by her will her residuary estate would be divided equally between her four sons. The deed also recited that the mother was seised, or had power to dispose of, real estate, the particulars whereof were specified in a schedule to the deed. It further recited disputes as to the effect of the antenuptial letter, and that to end them the arrangement was entered into effected by the deed. By the witnessing part, the mother covenanted that her executors would at her death pay to the son such a sum as should be found to be the amount to which he would have been entitled if her real and personal estate had consisted of the particulars specified in the schedule, and she had died without altering her will as it stood when the letter was written. The descriptions in the schedule comprehended not only property of which she could dispose, but other property of which she was tenant for life only, and which was intermixed with the former, and this was noticed in the schedule.

Held, —

1. That there was not sufficient controlling context to restrict the covenant to the value of her own property.
2. That without conclusive evidence of an intention on the part of both parties at the execution of the deed to enter into some other contract, it could not be reformed.³
3. That until the amount to be paid was ascertained, there was no debt carrying interest.

THIS was an appeal against an order of Vice-Chancellor KINDERSLEY praying that so much of it as refused the application of the petitioner Frederick Cook Fowler for himself and the de-

Mortimer v. Shortall, 2 Dr. & War. 372; Kerr F. & M. (1st Am. ed.) 421; Bentley v. Mackay, 31 L. J. Ch. 709; 4 De G., F. & J. 279; Bold v. Hutchinson, 5 De G., M. & G. 558, note (1); Andrew v. Spurr, 8 Allen, 412; 2 Lead. Cas. in Eq. (3d Am. ed.) 670, in the note to Woollam v. Hearn; Glass v. Hulbert, 102 Mass. 24.

² See Bentley v. Mackay, 31 L. J. Ch. 709; 4 De G., F. & J. 279; Fowler v. Scottish Equitable Life Ass. Co., 28 L. J. Ch. 228.

³ See cases cited in note (1) above. In Stockbridge Iron Co. v. Hudson River Iron Co., 102 Mass. 45, 49, Chapman C. J. said: "The ordinary rule of evidence in civil actions, that the fact must be proved by a preponderance of evidence, does not apply to such a case as this. The proof that both parties intended to have the precise agreement set forth inserted in the deed, and omitted to do so by mistake, must be made beyond a reasonable doubt, and so as to overcome the strong presumption, arising from their signatures and seals, that the contrary was the fact." See Tucker v. Madden, 44 Maine, 206; United States v. Munroe, 5 Mason, 572; Lyman v. Little, 25 Vt. 576; Kerr F. & M. (1st Am. ed.) 421, and cases cited in notes.

fendants, the executors of Mary Soame Fowler, for leave to file a bill to rectify an indenture of the 19th of June, 1843, and, as directed, that all the property scheduled to that indenture should be taken into account and be considered as the property of Mary Soame Fowler in computing the sum to which the defendant Robert Cook Fowler was entitled under the indenture, might be reversed, and that such of the directions consequential thereon, as it might be necessary to alter, might be altered accordingly.

* 251 * The question in the case, so far as it was the subject of appeal, arose upon the above-mentioned deed of the 19th of June, 1843, the appellant contending that he was entitled to construe that instrument in a particular manner, or that if the deed would not bear the construction which he sought to place upon it, then that it ought to be reformed upon the ground of its not containing the true intention of the parties, owing to a mistake which occurred in its preparation, and which was overlooked at the time of its execution.

The deed itself contained recitals of most of the facts necessary to introduce the question.

Mr. Thomas Fowler, the father of the appellant and of the defendant Robert Cook Fowler, made his will, dated the 27th of September, 1827, by which he gave the residue of his personal estate, and all his real estate in or over which he had any devisable interest or power of appointment, to his wife for life, and after her death, or in her lifetime with her consent, he authorized his sons John, Thomas, and Robert to sell the real estate, and after his wife's death to sell the personal estate, and to pay his son Frederick (the appellant) 5000*l.*, and to divide the residue amongst his three sons and his five daughters, directing that one daughter, who had been advanced to the extent of 4000*l.*, should add it to the residue before being entitled to a share, and that if the daughters' share in the residue exceeded 10,000*l.*, the excess was to be divided amongst the sons.

The testator died in December, 1830, leaving his wife Mary Soame Fowler him surviving. She afterwards executed
* 252 three testamentary papers, namely, a * will, dated 23d of December, 1855, and two codicils, one dated the same day as the will, and the other on the 7th of September, 1836.

By her will she devised all her real estate to trustees upon trusts for sale, and to stand possessed of the moneys to arise from

the sale, and also her residuary personal estate, upon trust, to divide such moneys into as many shares as should be equal to the number of her children who should be living at her decease, or who dying in her lifetime should have a child or children living at or born after her decease, one of such shares to be paid to or held in trust for each of such children in manner thereafter expressed. She also directed that the sum of 5000*l.* bequeathed to her son Frederick should be brought into the account against him or his family, and that the shares of the residuary estate of her husband, by his will bequeathed to her sons respectively, and directed to be held in trust for her daughters respectively and their children, should be brought into account against her said children respectively and their respective families, and considered as part of their respective shares of the moneys arising under the trusts of the recited will, it being the intention of the testatrix that the portions or fortunes of all her children and their families, whether derived from advances made to her sons by her upon their respective notes of hand, or from settlements made by her late husband in his lifetime, or under his will, or under her own will, should be equal in amount. Then she provided that her daughters' portions should not exceed altogether, under any circumstances, the sum of 13,000*l.*

In August, 1837, Robert Cook Fowler was about to * be * 253 married to Miss Gooch. Being anxious to satisfy Mrs. Gooch, her mother, as to his fortune and expectations, he wrote to his mother on the subject, and on the 4th of August, 1837, she wrote to him a letter, upon the footing of which all the subsequent arrangements proceeded, and which ultimately produced the deed in question.

The material part of that letter was as follows: "With respect to the 20,000*l.* you mention, I expect you eventually to receive that sum from me; after your three sisters have received their eleven or twelve thousand each, the remainder, as my will stands, will be divided equally between my four sons, and according as land may rise or fall, the shares may be more or less, of course. You may tell Mrs. Gooch, to whom it is necessary to lay open these worldly affairs, that not one acre is mortgaged. There is not a debt of 20*s.* upon any part of the property; and if it will be a satisfaction to her, I will go to my lawyer in London, meet her and you, and by deed secure the fourth part,

whatever it may be at my departure hence, entirely out of my power to make any alteration against your interest."

Soon after the date of this letter, and probably not without reliance upon the statements which it contained, the marriage of Robert Cook Fowler took place, and upon that occasion a marriage settlement was executed, bearing date the 21st of August, 1837, by which Robert Cook Fowler covenanted to assure and settle all the estate, property, and effects, both real and personal, which he should become beneficially seised or possessed of or entitled to, at law or in equity, under any gift, devise, bequest, or appointment by his mother Mary Soame Fowler in his favour.

* 254 * Differences and controversies afterwards arose between

Robert Cook Fowler and his mother, touching the force, nature, and extent of the engagement contained in the letter of the 4th of August, 1837, and it was as the deed of the 19th June, 1843, recited, "in order to determine all such differences and controversies" that they entered into an amicable arrangement, the terms of which were embodied in the covenants and agreements contained in that deed.

The deed was made between Mary Soame Fowler of the one part, and Robert Cook Fowler of the other part. It recited the above facts and circumstances, and set out the letter of the 4th of August, 1837. It then recited as follows: "And whereas the said Mary Soame Fowler was, at the date of the letter, seised in fee-simple or otherwise absolutely entitled to, or had the power of disposal over, very considerable real estates, consisting chiefly of freehold hereditaments situate in the said counties of Suffolk and Norfolk, the particulars of which said real and personal estate are specified and set forth in the schedule hereto." It then recited that Mary Soame Fowler had, at the date of the letter, executed the above-mentioned will with codicils, which were all fully recited. Then there was a recital that Robert Cook Fowler had called upon Mary Soame Fowler to carry into effect the engagement contained in her letter, and that differences and controversies had arisen between them, and that in order to determine them the arrangement effected by the deed had been entered into. The operative part of the deed was in these terms: "In consideration of the premises, the said Mary Soame Fowler, for herself, her heirs, executors, and administrators, hereby cove-

nants and agrees with Robert Cook Fowler, his executors and administrators, that the executors or administrators * of the said Mary Soame Fowler shall and will, within * 255 the period of twelve calendar months from her decease, pay to the said Robert Cook Fowler, his executors, administrators, or assigns, such a sum of money as shall, upon an account to be taken, be found to be the amount to which the said Robert Cook Fowler would have been entitled under the will and codicils of the said Mary Soame Fowler, in case her real and personal estate, at the date of the last of such codicils and at the time of her decease, had consisted of the particulars specified and set forth in the said schedule hereto, and in case all the sums of money and shares of residue directed by her said will to be brought into account were accounted for accordingly, and in case she had died without having made any other testamentary disposition of her real or personal estate, or any part thereof respectively, than such disposition as is contained in the will and codicils of her the said Mary Soame Fowler hereinbefore respectively recited, and which were made and executed previously to the date of the said hereinbefore recited letter of the 4th day of August, 1837, and without having in any manner revoked such disposition, or alienated, charged, or incumbered any part of the real and personal estates particularized in the said schedule, or done any other act whereby the share of the said Robert Cook Fowler in the trust-moneys to be produced by the real and personal estate under the same will and codicils might, could, or would have been in any manner diminished or affected. And it is hereby agreed between the said parties hereto, that such sum of money, when ascertained, shall be accepted and taken by the said Robert Cook Fowler, his executors, administrators, and assigns, in full satisfaction of all claims and demands whatsoever which the said Robert Cook Fowler, his executors, administrators, or assigns, could or might have or claim under or by virtue of the said recited * letter, and in full performance of all the engagements * 256 on the part of the said Mary Soame Fowler contained in such letter; and that in ascertaining the amount of such sum, no regard shall be had to any event whereby the share in the said trust-moneys of any brother or sister of the said Robert Cook Fowler shall by survivorship, accruer, or otherwise have become divisible among the survivors or others of the chil-

dren of the said Mary Soame Fowler, under the directions in her said will and codicils contained ; but that the amount to be paid to the said Robert Cook Fowler shall be estimated as if all the children of the said Mary Soame Fowler entitled to share in the said trust-moneys at the date of the letter of the 4th day of August, 1837, were still living and entitled to share at the time of her decease, whether all such children shall be so living and entitled or not, and as if all the legatees and annuitants under such will and codicils or any of them were living at the time of her decease, and entitled to the respective legacies and annuities thereby bequeathed to them respectively, whether they shall be so living and entitled or not.

The schedule was as follows : —

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* *The Schedule above referred to.—Real Estate.* * 257

	PARISH.	QUANTITIES.	TENANTS.	RENT.		
		A. R. P.		£	s.	d.
SUFFOLK	Corton	208 0 7	Wm. Stannard Goodrich	870	0	0
		227 8 26	Thomas Woods	488	0	0
		197 8 25	William Row	400	0	0
		Cottage and garden	Charles Soanes	846	0	0
		Ditto	Daniel Leggett	8	0	0
		Ditto	Joseph Smith	8	0	0
		Ditto	William Todd	8	0	0
		Ditto	George Minns	2	0	0
		Ditto	John Tiddyman	1	10	0
		Ditto	George Leacy	4	0	0
		Ditto	Ann Cully	0	15	0
		Ditto	George Cubitt	4	4	0
		Ditto	— Castleton	4	4	0
			The corn tithes of the whole parish, produced from lands not belonging to Mrs. Fowler	75	8	0
			[Note.—Some portion of the above estate belonged to the late Mr. Fowler, and passed by his will.]			
	Belton	Cottage and 5 acres	John Fowler, Esq.	40	0	0
		90 1 15	Isaac Hammond	95	0	0
		61 0 28	Charles Hammond	68	0	0
		113 8 88	Richard Howard	60	0	0
		Cottage and 11 acres	Rev. Thomas Fowler	80	0	0
		Cottage and 9 acres	Robert Jerney	14	0	0
		Cottage and 27 acres	Edward Furman	0	10	0
		Cottage and garden	John Guyton	2	0	0
		Ditto	Widow Furman	6	0	0
		Ditto	William Woodcock	2	10	0
NORFOLK	Bradwell, Haddiscoe, & Belton	850 2 8	William Sheppard	505	0	0
		197 1 14	William Cobb	250	0	0
	Browston & Bradwell	182 8 85	Henry Hammond	172	0	0
		78 8 17	Edward Stannard	100	0	0
	Bannington, Aylsham, & Tutington	212 8 5	John Hayn	257	0	0
			[Note.—A portion of the above estate, containing 25a. 0r. 87p., belonged to the late Mr. Fowler, and passed by his will.]			
	Yarmouth	Message and dwelling-house				

Personal Estate.

Agreed to be taken to have been at the time the letter was written of the value of five hundred pounds (£500), after payment of debts, and exclusive of any sums of money which may have been due to her from any of her sons.

* 258 * It appeared that Mrs. Fowler had been since her husband's death in possession of the estates in Norfolk and Suffolk, which passed under her husband's will, and in which she had a life-estate; that there had been a unity of possession between those estates and the lands to which she was entitled in fee-simple, and that there was great difficulty in distinguishing them.

The value of the respective estates comprised in the schedule, as appearing from the Master's report, was as follows:—

The Corton estates comprised in the schedule were,—

	£	s.	d.	£	s.	d.
Belonging to Mrs. Fowler	21,333	15	0			
„ Mr. Fowler	4,030	0	0			
	<hr/>			25,363	15	0

The Bradwell, Belton, and Haddiscoe estates comprised in the schedule were,—

Belonging to Mrs. Fowler	14,730	0	0			
„ Mr. Fowler	22,652	9	6			
	<hr/>			37,382	9	6

The Bennington estate comprised in the schedule was,—

Belonging to Mrs. Fowler	6,600	0	0			
„ Mr. Fowler	840	0	0			
	<hr/>			7,440	0	0

				70,186	4	6
Yarmouth dwelling-house				300	0	0
				<hr/>		
				70,486	4	6
And personal estate				500	0	0
				<hr/>		
				70,986	4	6

* 259 * Mary Soame Fowler died on the 30th of December, 1847. After 1843, having made several codicils to her will (the effect of the whole of which was to give nearly all the property of which she could dispose to Frederick Cook Fowler), she appointed Frederick Cook Fowler, Robert Alfred Rackham, John Bridges, and Thomas Fowler Steward her executors, and they proved the will and codicils, except one codicil, which was missing.

In March, 1848, Frederick Cook Fowler filed a bill against his co-executors and the persons interested under the will and codi-

cils, and under the deed of arrangement of the 19th of June, 1843, praying that the trusts of the will and codicils of Mrs. Fowler might be performed under the decree of the Court, and that the usual accounts might be taken, and that it might be referred to the Master to inquire whether it would be for the benefit of the parties interested under the settlement of the 21st of August, 1837, that the arrangement effected by the deed of the 19th of June, 1843, should be carried into effect, and if so, that it might be carried into effect accordingly, and that the rights of the plaintiff and all other parties in Mrs. Fowler's residuary estate might be ascertained and declared, and for consequential relief.

A decree was made directing accounts and inquiries.

In the course of the proceedings in the suit, the plaintiff Frederick Cook Fowler, applied by summons in Chambers for leave for himself and the defendants, his co-executors, to file a bill for the rectification of the deed of the 19th of June, 1843.

On the application being adjourned into Court, all parties, by their counsel, consented that it should be dealt with as if such a bill had been filed, and the cause * had come on to * 260 be heard, but without prejudice to the right of any person interested to appeal, all parties by their counsel admitting that they were unable to produce any further evidence, and did not desire to cross-examine any person who had made an affidavit on either side, and that none of the parties desired that the cause should stand over for further evidence.

Upon this adjourned summons, the Vice-Chancellor being of opinion that if a bill had been filed, and such evidence only had been adduced as was before the Court, no relief would have been given, refused the application ; and it was declared that all the property scheduled to the indenture of the 19th of June, 1843, was to be taken into account, and was to be considered as the property of Mary Soame Fowler, the testatrix, in computing the sum to which the defendant Robert Cook Fowler was entitled under the deed, and that in estimating the shares of the residuary estate of the testator Thomas Fowler, which were to be brought into account, they were to be taken at the amounts at which they had been ascertained in the suit for the administration of Thomas Fowler's estate, and consequential directions were given, and accounts were ordered to be taken for carrying the above declaration into effect.

His Honor, in giving judgment, said that the principle to be deduced from the whole of the cases was that, whereas it was a very strong exercise of equitable jurisdiction to alter a deed solemnly and deliberately executed by all parties, such an exercise of jurisdiction ought not to take place unless the Court was satisfied by the evidence beyond all reasonable doubt that the intention of both parties, up to the very moment of the actual

signing, sealing, and delivering the deed, was such as was * 261 proposed to be expressed by it in its * reformed state, and that by mistake or miscarriage the deed had not carried out that intention. On the other hand, if the Court was satisfied that, up to the last moment, all the parties meant one and the same thing, and that they had not carried out that intention by the deed, owing to a mistake, a slip, a misapprehension, or a mere technical mistake of a clerk in appending one schedule when another was intended, the Court was bound to rectify the settlement, and had done so in many cases.

Frederick Cook Fowler appealed from the portions of the order mentioned at the beginning of the case.

The Solicitor-General (Sir H. CAIRNS), *Mr. Baily*, and *Mr. J. Pearson*, in support of the appeal.

Sir R. Bethell, *Mr. Glasse*, *Mr. C. Hall*, and *Mr. Rowcliffe*, for Robert Cook Fowler and other defendants claiming under his marriage settlement.

The nature of the arguments appears sufficiently from the judgments.

Judgment reserved.

May 26.

The Lord Chancellor, after stating the case and the material portions of the deed of the 19th June, 1843, said :—

Upon this deed the appellant, as I have already stated, raises two questions.

First. That upon the true construction of the deed the only property which can be taken into account in ascertaining

the amount which Robert Cook Fowler is entitled * to * 262 under the will and codicils of his mother is her property, and that any portion of the estate mentioned in the schedule which belonged to his father ought to be wholly excluded. This is contended for on the ground of the repugnancy which would be produced between the recital and operative part of the deed on the one hand, and the schedule on the other, by a different construction; and reliance is placed on the words of PATTERSON, J., in *Walsh v. Trevanion*, (a) “that when the words in the operative part of a deed of conveyance are clear and unambiguous, they cannot be controlled by the recitals or other parts of the deed.” Now it is said that the recital states that the particulars of the estates specified and set forth in the schedule are those of Mrs. Fowler alone, and that the operative part of the deed is limited in the same manner; and that, although it appears that other property than that of Mrs. Fowler is inserted in the schedule, the indication of intention in the body of the deed not to include it is so strong that the schedule must be forced to yield to this intention.

There is, however, another rule of construction which must be regarded, viz., that it be such as that the whole deed and every part of it may take effect, and none be rejected. Sheppard's Touchstone. (b) Adopting this rule, it appears to me that every part of the deed is capable of a consistent interpretation without offering any violence to its language. Although the recital seems to be framed with reference to Mrs. Fowler's estate only, the particulars of which are stated to be specified and set forth in the schedule, yet it does not in terms refer to the schedule as containing her property and nothing else. And the operative part of the deed is still more easily reconcilable with the schedule. For the words are, “in case her real and personal estate, * at the date of the last of such codicils * 263 and at the time of her decease, had consisted of the particulars specified and set forth in the schedule hereto.” These words might be construed to mean, that although Mrs. Fowler might part with some portion of the specified estate after the execution of the deed, yet, for the purpose of determining the amount which Robert Cook Fowler would have been entitled to, they were still to be considered and reckoned as his. But they

(a) 15 Q. B. 751.

(b) Page 87.

may also mean this: "I will insert in a schedule the particulars of various properties without regard to whether they all actually belong to me or not, and your share under my will shall be calculated upon the footing of every thing included in the schedule being mine." And when I find that the schedule mixes up the property indiscriminately, and at the same time represents some portion as "belonging to Mr. Fowler and passing by his will," how can I hesitate as to which of these two constructions I ought to adopt, — the one which reconciles the whole deed, however inexplicable and even unreasonable the intention may appear; or the other, which produces an inconsistency to be avoided only by rejecting a part of the instrument?

It was asked, in the course of the argument, why the notes that "portions of the estate belonged to Mr. Fowler" were inserted in the schedule except for the purpose of preventing its being taken as intended to include his property? But I think this might be answered by another question, Why was property of Mr. Fowler's put into the schedule for the purpose of excluding it? I do not pretend to be able to explain this circumstance to my own satisfaction; but it may be suggested, that if this note had not been added, and it had afterwards been found that

property of Mr. Fowler's to a considerable amount was
* 264 contained in the schedule, * it might have been attributed to the ignorance or inadvertence of the drawer of the deed, whereas by the addition of the notes it would be shown that its insertion was designed and intentional. Taking the deed as it now stands, I do not see how it is possible for me to construe it so as to exclude any of the particulars contained in the schedule which are not the property of Mrs. Fowler.

But the appellant insists, in the next place, that it was the meaning of all the parties that the deed should be confined to Mrs. Fowler's property; that if it includes any thing more it has arisen from mistake or accident; and he calls upon the Court to rectify the deed so as to make it correspond with this intention.

The power which the Court possesses of reforming written agreements where there has been an omission or insertion of stipulations contrary to the intention of the parties and under a mutual mistake, is one which has been frequently and most usefully exercised. But it is also one which should be used with

extreme care and caution. To substitute a new agreement for one which the parties have deliberately subscribed ought only to be permitted upon evidence of a different intention of the clearest and most satisfactory description. Lord THURLOW's language is very strong on this subject; he says, "The evidence which goes to prove that the words taken down in writing were contrary to the concurrent intention of all parties must be strong, irrefragable evidence." *Lady Shelburne v. Lord Inchiquin*. (a) And this expression of Lord THURLOW is mentioned by Lord ELDON in the *Marquis of Townshend v. Stangroom*, (b) without disapprobation. If, however, Lord THURLOW used the word "irrefragable," in its ordinary meaning, to describe *evidence * 265 which cannot be refuted or overthrown, his language would require some qualification; but it is probable that he only meant that the mistake must be proved by something more than the highest degree of probability, and that it must be such as to leave no fair and reasonable doubt upon the mind that the deed does not embody the final intention of the parties. It is clear that a person who seeks to rectify a deed upon the ground of mistake must be required to establish, in the clearest and most satisfactory manner, that the alleged intention to which he desires it to be made conformable continued concurrently in the minds of all parties down to the time of its execution, and also must be able to show exactly and precisely the form to which the deed ought to be brought. For there is a material difference between setting aside an instrument and rectifying it on the ground of mistake. In the latter case you can only act upon the mutual and concurrent intention of all parties for whom the Court is virtually making a new written agreement.

Has the appellant, then, given such evidence as must be demanded of him to establish not only that there has been a miscarriage or mistake in framing the deed, but also as to the exact form to which it should be brought in order fully to meet the real and complete intention of the parties?

I think it will be unnecessary to go at any length into the correspondence which constitutes the evidence on this subject. The most important part of it must be that which took place at the period of the preparation of the deed, and more particularly with respect to the schedule, upon which the whole contest turns.

(a) 1 Bro. C. C. 341.

(b) 6 Ves. 334.

At the time when the negotiations began, which terminated in the deed of arrangement, both parties seem to have been
 * 266 proceeding * entirely upon the expectations of Robert Cook Fowler with reference to his mother's property only. This, I think, is shown by the letter of Mr. Morphett to Mr. Bridges of the 4th January, 1843, which commences the correspondence, and which suggests the propriety of Mrs. Fowler fulfilling the engagement contained in her letter of the 4th August, 1837. That engagement is thus expressed: "With respect to the 20,000*l.* you mention, I expect you eventually to receive that sum from me." "After your three sisters have received their eleven or twelve thousands each the remainder, as my will stands, is to be divided equally between my four sons." The treaty, therefore, originated in an assumed engagement that Robert Cook Fowler should derive benefit under his mother's will to the extent of 20,000*l.* at the least. Mr. Bridges, the solicitor of Mrs. Fowler, had obtained an opinion upon this letter: "That the marriage having been solemnized on the faith of it, and its terms being sufficiently definite to admit of a specific performance, a Court of Equity would treat the letter as a contract founded on valuable consideration."

The object, therefore, of the parties and their solicitors was to enter into some arrangement by which the necessity of a chancery suit might be prevented. Accordingly Mr. Bridges, first of all, proposes that Robert Cook Fowler should virtually give up a sum of about 2000*l.* out of his expected share by permitting his mother to dispose of her property to that amount.

There was then a letter from Mr. Bridges to Mr. Morphett of the 2d of March, 1843. Mr. Bridges there says: "If I understood you aright when I had the pleasure of seeing you, I understood you would recommend Mr. Robert Fowler and his advisers
 * 267 either * by will or in her life, as would reduce his share according to its amount at the date of the letter by 2000*l.*"

Then he mentions certain acts which Mr. Fowler had done since the letter, and he says: "If Mrs. Fowler will execute a deed engaging that Robert shall share equally with his three brothers in her residuary estate after payment to daughters, and that she will from henceforth do no act to reduce the value or amount of such residue, will you recommend your clients to engage not to

disturb or call in question any of her acts above enumerated which she has done since the date of the letter? You know there is a strong opinion that the voluntary settlement is capable of being disturbed, and it cannot possibly be interfered with except by an adverse suit, seeing it is entirely for the benefit of a *feme covert* and minors. I think this plan will obviate all difficulties and settle all the questions in the most satisfactory and simple manner. Setting aside John's debt, the share of Robert in what has been disposed of by his mother very little exceeds the proposed limit of 2000*l.*, and Mrs. Fowler concedes the principle as to her right to make voluntary settlements during her life, which certainly by this plan places your clients in a better position."

This proposal was in the first instance declined by Mr. Morphett by a letter of the same date, but he appears afterwards to have agreed to it, for in a subsequent letter of the 6th of March, 1843, he says: "The principle which I have stated (that is to say, sacrificing to the extent of 2000*l.*) I will abide by for the sake of peace, but beyond that I will not go, nor will the parties."

Upon this understanding, therefore, it was proposed that instructions should be given to counsel to prepare the draft * of a deed for carrying out the arrangement, Mr. James * 268 Parker being the counsel on behalf of Mrs. Fowler, and Mr. Hayes on the part of R. C. Fowler. Mr. James Parker, having been consulted by Mr. Bridges, wrote an opinion which is not in evidence, but on which additional instructions were laid before him by Mr. Bridges in these terms: "The principle of the arrangement is perfectly understood by Mr. Parker. Mr. Robert Cook Fowler is to receive at his mother's death the sum he would have received if she had died at any time after the date of the letter of August, 1837, without having in any manner altered her will as it stood at that date, and he is to return 2000*l.*; but as he is to be a loser by no alienation, debts, or incumbrances subsequent to the letter, he is not to benefit by any lapse, survivorship, or after-acquired property." The third head of the instructions was thus expressed: "There is no other mode of coming to any arrangement, as it is impossible to agree on a fixed sum, to which both parties entertain great objections, and their opinions differ so widely as to the value of the estate, and consequently as to the amount, that it is perfectly useless to attempt any arrangement on this principle." Mr. Parker in his opinion says: "The pro-

posed compromise may be carried into effect by an indenture made between Mrs. Fowler and Mr. Robert Cook Fowler. It should recite the will and codicils of Mrs. Fowler made previously to the letter of August, 1837, so as to show the precise interest thereby given to Robert Cook Fowler, and the amount of legacies. It should also recite the letter of August, 1837, and Mr. Robert Cook Fowler's marriage, and the settlement made on his marriage. It should also contain recitals showing what real estates Mrs. Fowler then had, and it should state the amount of her personal estate after payment of her debts, which I suppose the parties can agree upon, and it should recite the agreement for a compromise."

* 269 * Still, therefore, Mrs. Fowler's property appears to have been the only subject in the contemplation of the parties. Such clearly seems to have been Mr. Parker's view in his opinion which I have just read; and Mr. Hayes follows out the same idea in the draft which he subsequently prepared, and which contains at the end of it evidently a description merely of the nature of the schedule which ought to be appended to the deed before its execution, and not the proper form of heading of such schedule.

I do not think that any conclusion of importance can be derived from the alterations which were made by Mr. Parker in Mr. Hayes's draft. They were introduced partly to supply an omission, and probably in entire accordance with Mr. Parker's views as to the property which the deed was to embrace.

In the preparation of the draft, Mr. Hayes had in a recital referred to a schedule to be annexed to the deed, but in the operative part he had apparently overlooked the necessity of a similar reference, and Mr. Parker, therefore, amended the draft by inserting the words, "in case her real and personal estate, at the time of her decease, consisted of the particulars specified and set forth in the said schedule hereto."

Hitherto I have been able to discover no change of intention, and every step which has been taken appears to have been in perfect accordance with the understanding upon which the negotiations commenced. But the moment we come to the consideration of the schedule, the appellant's difficulty begins, and no evidence which he has produced has, in my judgment, enabled him to surmount it. It appears that Mrs. Fowler had been,

since the death of her husband, in possession of estates * in * 270 the counties of Norfolk and Suffolk, which passed under her husband's will, and in which she had a life estate, and there had been a unity of possession between those estates and the estates over which she had herself a power of disposal, and great difficulty existed as to distinguishing between the two properties.

In order to carry out the arrangement, it was necessary to obtain accurate information as to the property, and accordingly Messrs. Bridges & Mason wrote to a Mr. Read, and requested him to inform them "as to the nature and extent of the property over which Mrs. Fowler has power of disposal by will." Read, on the 5th March, 1843, sent an abstract of the valuation of the estate in Suffolk and of the farm in Norfolk, then in Mrs. Fowler's possession, valuing the farm in Norfolk, called Bannington, at 7400*l*. This farm appears to have been considered to be the property of Mr. Fowler; for the valuation of Read having been sent to Mr. Morphett, he writes on the 6th of March, 1843, "as to the Norfolk estate, I am told that the late Mr. Fowler was offered 10,000*l*. for it, after which offer he added some freehold land to it, so that in the estimate this estate cannot very well be put down at less than 10,000*l*."

And this Norfolk farm, to which the attention of Mr. Bridges is thus specially called, is included amongst the particulars in the schedule.

There are two schedules annexed to the draft. By whom the first of them was prepared does not distinctly appear. It is said to have been by Mr. Bridges, but, if so, it seems extraordinary that he should have objected to a schedule of his own preparation, as it appears he did by a marginal observation, in the handwriting of Mr. Morphett, and that he should have sent it to Mr. * Morphett, if that were indeed the draft of the sched- * 271 ule which accompanied the letter to him of the 31st May, 1843. It certainly could not have been the schedule which was ultimately approved and adopted, and which is admitted to have been made by Mr. Bridges, because he had not the materials for the schedule till after the 1st of June, when he wrote to Mr. Read desiring him to add the number of acres in the different parishes. Mr. Read complied with this request, and on the 5th June sent the schedule, which was no doubt the one which was ultimately annexed to the deed, or which furnished the materials from which

Mr. Bridges made that schedule. Mr. Read says: "The schedule sent herewith is the best I can make from the documents in my possession, which are principally transcripts from maps which I have not seen. It probably was not necessary that the whole estate should be included in the schedule, but you can select such parts as are required for the purposes you mention."

This schedule was sent to Mr. Morphett prior to the 8th of June; he then had in his possession both the schedules, for he forwarded them in a letter of that date to Robert Cook Fowler. The schedule referred to is the one which is now annexed to the deed. It contains in it the particulars of property belonging to Mr. Fowler of the value of 26,568*l.* 7*s.* 10*d.*, and it omits a small portion of Mrs. Fowler's property to the extent of seventy-three acres. After Robert Cook Fowler had examined and approved of this schedule, the draft of the deed was re-settled by Mr. Hayes and some slight alterations made, and it was afterwards engrossed and executed by Robert Cook Fowler on the 19th of June, 1843.

Upon these facts is there sufficient and satisfactory proof that the schedule, in its present form, was added to
 * 272 * the deed under a mistake, even by Mr. Bridges acting on behalf of Mrs. Fowler? His conduct upon that supposition is quite inexplicable. He objects to the first schedule on the ground "that it comprised all the Fowler estates, as well what belonged to Mrs. Fowler as that which belonged to Mr. Fowler and passed under his will." But he then prepares another schedule which excludes Mr. Fowler's property "as near as it can be done" (according to the marginal observation in the draft), or which represents the property belonging to Mrs. Fowler "as nearly so as he can make it" (according to the letter of the 8th June, 1843), and he adopts this schedule, and allows his client to execute the deed, of which it forms part, knowing that it includes property of Mr. Fowler, and — as the amount of this property has been since ascertained — I assume that he might, without difficulty, have discovered (if he was ignorant of the fact) that it was not of insignificant value, but amounted to upwards of 26,000*l.*

How, then, upon such evidence as this, can I come to the conclusion that the schedule thus deliberately adopted was contrary to the intention of Mrs. Fowler, acting by her agent Mr. Bridges?

Is it not at least as probable that—the negotiations for an arrangement having commenced upon the understanding that Robert Cook Fowler was to have 20,000*l.* as his share of his mother's property—Mr. Bridges, finding that the schedule, with all its particulars, would not exceed that value, and—if Mr. Fowler's property were excluded—would fall very far short of it, or perhaps merely satisfying himself that it contained a sufficient amount of property to meet the engagement contained in Mrs. Fowler's letter of the 4th of August, 1837, intentionally left the schedule in its present form? In his affidavit, Mr. Bridges gives no explanation which is inconsistent with this supposition. * At all events, he leaves the circum- * 273 stances involved in so much doubt, that I could not feel justified in rectifying the deed, even upon the ground of its having been mistakenly framed contrary to *his* intention.

But even if my mind could be brought clearly to this conclusion, the evidence would still be deficient. It is necessary to show that the mistake which has occurred is opposed to the intentions of both the parties to the deed, and in this the proof utterly fails. There is no reason to believe that Robert Cook Fowler understood and intended that any part of the property contained in the schedule should be excluded from it; on the contrary, he must have supposed that it represented every thing upon which the calculation of the amount he was to receive under his mother's will and codicils was to be made. This is the account which he gives in his affidavit. And he also states, that he would not have consented to a schedule which would have produced only 11,000*l.* or 12,000*l.* How, then, can I, in the face of these statements, assume that he had a totally different intention, which has been disappointed by the form of the schedule?

Upon the question of rectifying a deed, the denial of one of the parties, that it is contrary to his intention, ought to have considerable weight. Lord THURLOW, in *Irnham v. Child*, (a) says, “The difficulty of proving that there has been a mistake in a deed is so great, that there is no instance of its prevailing against a party insisting that there was no mistake.” And Lord ELDON, in *Marquis of Townshend v. Stangroom*, (b) after observing that Lord THURLOW seemed to say that the proof must satisfy

(a) 1 Bro. C. C. 93.

(b) 6 Ves. 334.

the Court what was the concurrent intention of all the
* 274 parties, adds, "And it must never be forgot to * what
extent the defendant, one of the parties, admits or denies
the intention."

Under all these circumstances, therefore, I cannot bring myself to the conclusion that the schedule is contrary to the concurrent intention of both the parties, and I must therefore decline to hazard the exercise of a jurisdiction by which I might be imposing a different agreement upon one of them, at least from that which he has deliberately executed.

I might leave the case here, but I think it right to advert to two other points which have been pressed upon me, as objections to reforming this deed. It is said, in answer to the plaintiff's claim to have the deed rectified, you must not only prove that there has been a mistake, but you must also be able to show clearly what ought to be the amended form of the deed. In this case it was apparently the object of the parties that all Mrs. Fowler's property at least should be taken into account in calculating the amount to which Robert Cook Fowler would be entitled; but some part of it (not a very large part) has been omitted. Is the schedule to be rectified, not merely by removing from it all the particulars which relate to Mr. Fowler's property, but by inserting this omitted part of Mrs. Fowler's property, as to which the mistake is more clear than as to the other? I asked for some explanation of the views of the plaintiff's counsel upon this difficulty in the course of the argument, but received no satisfactory answer.

The other point which was urged by the defendants seems to me to present a formidable obstacle to an application to rectify this deed, viz., that it is impossible to place the parties in the
same position in which they stood at the time of its execu-
* 275 tion. On the 20th of * June, 1843, the very day after the
deed of arrangement was executed, Mrs. Fowler made a codicil to her will referring to the deed and making new arrangements and dispositions of her property, which were expressly founded upon it. The greatest injustice might, therefore, be done to Robert Cook Fowler by any alteration of the deed unless it could be clearly shown that he, as well as his mother, distinctly understood that it was intended to be in the precise form to which it is proposed it should now be brought.

There is only one other matter to be disposed of. The defendant Robert Cook Fowler claims to have interest on the sum which may be found to be due to him under the covenant in the deed, to be reckoned from the period of twelve months after Mrs. Fowler's death. The Vice-Chancellor thought that he was not entitled to any interest until the decree. The right to interest from the earlier period has been insisted upon, either from the rule adopted by the Court of Chancery in conformity with the 28th section of 3 & 4 Will. 4, c. 42, by which juries are allowed to give interest upon "all debts or sums certain, payable at a certain time or otherwise," or upon the general authority of the Court over the subject of interest. Upon the first ground I am clearly of opinion that the "sum of money which, upon an account to be taken, shall be found to be the amount which Robert Cook Fowler would have been entitled to under his mother's will and codicils" is not a debt, nor even a sum certain, till the amount of it is ascertained by taking the account, and consequently, by analogy to the Act of Parliament, that interest ought not to be allowed; and if the right to interest is excluded, and it is to be referred to my judicial discretion, I see no reason, under all the circumstances, why I should give interest from an earlier period than that which has been * directed by the Vice- * 276 Chancellor. I think that the order made by his Honor must be affirmed in all respects.

Appeal dismissed with costs.

[217]

DE MATTOS *v.* GIBSON.

1858. Dec. 17, 18. Before the LORDS JUSTICES.

1859. May 6, 7, 9, 27. Before the Lord Chancellor Lord CHELMSFORD.

Where property, either immovable or movable, is disposed of with notice of a prior contract entered into by the person disposing of it for its use in a particular manner, the person taking it with such notice may be restrained from using it otherwise.¹

The Court will not affirmatively enforce a charter-party,² but it is implied in such a contract, that if the charterer provides a cargo, the ship shall not be employed for any other purpose; and a mortgagee, with notice of a prior charter-party effected with the mortgagor, will be in general restrained from doing any thing to prevent its performance.³ Where, however, the mortgagor in such case was unable to put the ship into proper repair to make the voyage, or otherwise to perform the contract, and the charterer took no step for several months with respect to it: *Held*, that the mortgagee ought not to be further restrained from exercising the powers contained in his mortgage.⁴

THIS case first came on to be heard before the Lords Justices upon an appeal on the part of the plaintiff from the refusal by Vice-Chancellor WOOD, on the 25th of November, 1858, of a motion for an injunction to restrain the defendant George Tallentire Gibson, and all persons claiming through or under him, from removing a vessel called the *Allerton* to Newcastle, or otherwise interfering to interrupt a voyage mentioned in the bill, or from selling, transferring, or otherwise disposing of the vessel otherwise than subject to the burden of a charter-party of the 23d of October, 1857.

The bill and the affidavits in support of the motion stated, that

¹ See *Coles v. Sims*, 5 De G., M. & G. 1, and note (2) and cases cited; *Tulk v. Moxhay*, 2 Phil. 774; *Kerr F. & M.* (1st Am. ed.) 234, 235; *Bigelow J.*, in *Whitney v. Union Railway Co.*, 11 Gray, 364.

² See *Norton v. Serle*, Finch, 149; *Claringbould v. Curtis*, 21 L. J. Ch. 541; *Fry Specif. Perf.* [13] 55, note (x).

³ See *Lumley v. Wagner*, 1 De G., M. & G. 604, and note (2) and cases cited; *Catt v. Tourle*, L. R. 4 Ch. Ap. 654, 657; *Kerr Inj.* 521 *et seq.* 526, 531, 532; *Seawell v. Webster*, 7 W. R. 691; *Messageries Imperiales Co. v. Baines*, 11 W. R. 322; *Levin v. Deslandes*, 30 L. R. Ch. 457; 2 Dan. Ch. Pr. (4th Am. ed.) 1653.

⁴ See *Kerr Inj.* 529, 530.

by a charter-party, dated the 23d of October, 1857, and made between Henry Trewitt Curry, one of the defendants, described as the owner of the Allerton, * then in the port * 277 of Shields, of the one part, and the plaintiff of the other part, it was agreed that the Allerton should load a cargo of coal at one of the collieries in the river Tyne, and being so loaded should proceed to Suez and deliver the same. The freight to be paid at the rate of 60*l.* per keel of 21 tons 4 cwt.; one-third by charterer's acceptance at three months, and one-third by like acceptance at six months from the sailing of the vessel from her loading port, and the remainder on the right delivery of the cargo.

That when the charter-party was entered into the defendant Curry was acting as owner, and was in possession of the vessel under a contract for the purchase of her. That a considerable delay took place in the completion of the purchase, and that in consequence thereof a corresponding delay was occasioned in the dispatch of the vessel from her port of lading. That, on the 6th of January, 1858, the defendant Curry became the registered owner of the vessel, and that on the 12th of January, 1858, he mortgaged her to the defendant Gibson to secure a sum of 1500*l.* and interest, and that the mortgage was registered on the 20th of the same month.

That previously to and at the date of the mortgage the defendant Gibson had full notice of the charter-party, and, in fact, advanced the sum intended to be secured by the mortgage in order to enable the defendant Curry to perform the charter-party and earn the freight made payable thereby.

That shortly afterwards the vessel was dispatched with a cargo of coal on her voyage to Suez, and that thereupon * the plaintiff accepted bills drawn by Curry for 980*l.* 8*s.*, * 278 being the amount payable under the charter-party, which bills were discounted, and the amount of them was paid over to Gibson, or was under some arrangement with him, and by his direction applied to the discharge of part of the purchase-money of the vessel.

That the vessel met with bad weather in the Channel, and being much damaged was obliged to put into Penzance for repairs, at which port she was, when the bill was filed, in the hands of Mr. W. D. Matthews, a shipwright, who claimed a lien upon her for the value of the repairs.

That Gibson threatened and intended to sell the vessel under his power of sale without reference to her engagement under the charter-party, and that with that view he sent instructions to Matthews to allow her to be removed out of dock and sent back to Newcastle-upon-Tyne as soon as the repairs were completed, which would be in a few days.

The prayer of the bill was, that it might be declared that the charter-party of the 23d of October, 1857, ought to be specifically performed, and that the defendant Curry might be decreed to perform it accordingly, the plaintiff submitting to perform the same on his part, and that an injunction might be granted to restrain Curry from permitting the vessel and cargo to remain at Penzance or any place other than Suez, and also for an injunction against the defendant Gibson in the terms stated at the beginning of the case.

* 279 * The Vice-Chancellor delivered to the parties after term a written judgment as follows : —

On a full consideration of this case, I have come to the conclusion that it is not one in which a Court of Equity ought to interfere, either by way of specific performance or by way of injunction to restrain the defendant Gibson from using the ship before the completion of her voyage according to the charter-party. I conceive that the specific performance of an agreement to convey coals to Suez (which is in effect the operation of the charter-party) is beyond the control of the Court. For what directions could be given as to the navigation of the ship? By what process could the hiring of sailors, the appointment of a proper master, the victualling of the vessel and the like be enforced? As regards the injunction, I consider the observations of Lord St. LEONARDS in *Lumley v. Wagner*, (a) to apply to cases in which the breach of a positive agreement involves specific damage beyond that of the mere non-performance of the agreement itself. He says: "It was clearly intended that I. Wagner was to exert her vocal abilities to the utmost to aid the theatre to which she agreed to attach herself. I am of opinion that if she had attempted, even in the absence of any negative stipulation, to perform at another theatre, she would have broken the spirit and true meaning of the contract." That is to say, a

(a) 1 De G., M. & G. 618.

special damage would be done by her singing elsewhere at a rival theatre — *ultra*, the non-performance of her contract to sing at the theatre which had engaged her. The Court could not make her perform the latter engagement, but could prevent her doing any thing which was an aggravation of her breach of it. This is more apparent if his Lordship's observations on *Clarke v. Price*, (a) * (in p. 62 of the report in *Lumley v. Wagner*) * 280 are attended to. Indeed, at the close of his observations on that part of the case, his Lordship says he should not have granted any injunction on the affirmative part of the contract only on the case before him.

Now, in *Clarke v. Price* an injunction to restrain Mr. Price from writing any other reports until he had written reports for the plaintiff might have had the effect of compelling him to write for the plaintiff, but it was not the nature of the contract, as Lord ELDON observed, that there should be such a restriction ; so in the case before me it is no part of the contract that the ship should not carry coals for others, nor will the plaintiff be at all the worse for her doing so, beyond the mere loss of his contract. Any other ship will carry the plaintiff's coals as well, or probably better, and the whole matter sounds in damages. He would gain nothing by the ship remaining idle, whereas, in all cases of negative contracts, there is a positive benefit from their observance. Lord COTTENHAM, in *Heathcote v. The North Staffordshire Railway Company*, (b) puts the very case now before me as one in which the Court will not interfere. If A. contracts with B. to deliver goods at a certain time and place, will equity interfere to prevent A. from doing any thing that may or can prevent him from delivering the goods? I must refuse the motion, and let the costs of it be costs in the cause.

Mr. Amphlett and Mr. E. Macnaghten, for the plaintiff, the appellant. — They referred to *Storer v. The Great Western Railway * Company*, (c) *Tulk v. Moxhay*, (d) *Clarke v. Price*, (e) *Hooper v. Brodrick*, (g) *Webster v. Dillon*, (h) *Heathcote v. North Staffordshire Railway Company*, (i) *Lumley*

(a) 2 Wils. 157.

(b) 2 Mac. & G. 112.

(c) 2 Y. & Coll. C. C. 48.

(d) 2 Phil. 774.

(e) 2 Wils. 157.

(g) 11 Sim. 47.

(h) 3 Jur. N. S. 482.

(i) 2 Mac. & G. 112.

v. *Wagner*, (a) and to the Merchant Shipping Act, 17 & 18 Vict. c. 104, §§ 38, 43, 51, 69, 100, 103, 3d part.

Mr. Rolt and *Mr. Bedwell*, for the defendant Gibson. — The right to an injunction in the present case must depend on that to specific performance. But it is clear that this is not a contract which the Court will, or indeed can, specifically enforce. In *Flint v. Brandon*, (b) Sir W. GRANT says: "This Court does not, I apprehend, profess to decree a specific performance of contracts of every description. It is only where the legal remedy is inadequate or defective that it becomes necessary for Courts of Equity to interfere. In *Errington v. Aynesley*, (c) Lord KENYON says, 'A specific performance is only decreed where the party wants the thing *in specie* and cannot have it any other way.' I will not say Courts of Equity have, in every instance, confined themselves within this line; but this being the principle, I will not deviate from it further than I am bound, from deference to precedent and authority."

Mr. Amphlett, in reply.

THE LORD JUSTICE KNIGHT BRUCE — If the acts done by the defendant Mr. Gibson, of which the plaintiff complains, * 282 had been done by the * other defendant, without any participation or interference on the part of the defendant Mr. Gibson, and he had been wholly quiescent, I am of opinion that it would have been the duty of the Court of Chancery to grant, on the plaintiff's application, and the materials now before us, varied only as I have mentioned, an injunction against the defendant Mr. Curry. This, according to my view, both principle and precedent forbid us to doubt.

Then comes the question of the plaintiff's title to an injunction against the defendant Mr. Gibson in the actual circumstances of the case; a question that, in my judgment, is to be answered in the plaintiff's favour, and this whether he has a right of action against the defendant Mr. Gibson or not, a point as to which I think it unnecessary to say any thing. Reason and justice seem to prescribe that, at least as a general rule, where a man, by gift

(a) 1 De G., M. & G. 604.

(c) 2 Bro. C. C. 341.

(b) 8 Ves. 163.

or purchase, acquires property from another, with knowledge of a previous contract, lawfully and for valuable consideration made by him with a third person, to use and employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the third person, in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller. This rule, applicable alike in general as I conceive to movable and immovable property, and recognized and adopted, as I apprehend, by the English law, may, like other general rules, be liable to exceptions arising from special circumstances; but I see at present no room for any exception in the instance before us. The defendant Mr. Gibson, as between him and the plaintiff, has not, I think, any higher or better title than that of the other defendant. The title of Mr. Gibson must, I conceive, be treated as originating after the charter-party made between Mr.

Curry and the plaintiff, under which the * plaintiff claims. * 283 It preceded the mortgage made by Mr. Curry to the defendant Mr. Gibson, a mortgage taken by him with express notice of the charter-party; and by that charter party I conceive that he is accordingly, for every purpose of liability (I do not say to damages, but to an injunction against diverting the vessel from the agreed voyage or interrupting it), as much bound as the other defendant.

It was much urged in argument for the defendant Mr. Gibson that the charter-party did not alter the property in the vessel or affect her specifically, and was no more than a contract between two men as to the manner in which a mere personal chattel belonging to one of them should for a time be used and employed by him, he retaining the possession as well as ownership. But if that is so, why is a Court of Equity, therefore, not to act? Why should it not prevent the commission or continuance of a breach of such a contract, when, its subject being valuable, as, for instance, a trading ship or some costly machine, the original owner and possessor, or a person claiming under him, with notice and standing in his right, having the physical control of the chattel, is diverting it from the agreed object, that object being of importance to the other? A system of laws, in which such a power does not exist must surely be very defective. I repeat that, in my opinion, the power does exist here, and, therefore, as I think,

there should be an injunction to restrain the defendant Mr. Gibson and his agent from removing the vessel to Newcastle, or otherwise interfering to interrupt the voyage to Suez, until further order, the plaintiff undertaking, as he has already by his counsel stated his willingness to do. Of course, however, this order, being interlocutory, is provisional only. The case at the hearing may assume a materially different aspect, and the plaintiff may fail.

* 284 * THE LORD JUSTICE TURNER. — I also think that this injunction must be granted. We are here upon the question of an interlocutory injunction until the hearing of the cause, and the point, therefore, which I consider of importance to be attended to is whether there are or not difficult and important questions to be tried at the hearing.

It seems to me that there are three questions to be tried at the hearing of this cause which are questions certainly not at present sufficiently settled : one question, whether the plaintiff is entitled to a specific performance of the contract contained in the charter-party? Another question, whether, if he is not so entitled, he may not nevertheless be entitled to an injunction to restrain a breach of the contract contained in the charter-party? And the third, which appears to me to be open in this case, whether, inasmuch as I assume that it would not have been competent to Mr. Gibson, as between him and Mr. Curry, to have committed a breach of the contract so as to have brought down upon Mr. Curry an action for damages upon the charter-party, the charterer of the vessel may not be entitled to the benefit of that equity which Curry would have had as against Mr. Gibson the mortgagee? I think that is a question also deserving of very great consideration, which can only be decided at the hearing of the cause ; and without giving, therefore, any opinion on any of these questions, all of which must be discussed at the hearing, I think that there should be an injunction in the mean time.

The cause afterwards came on to be heard before Vice-
* 285 Chancellor Wood, who held that, upon the evidence * then before the Court, the bill might, consistently with the decision of the Lords Justices upon the motion, and ought to be dismissed, and his Honor ordered accordingly. From this decision

the plaintiff appealed ; and the appeal came on to be heard before the Lord Chancellor, whose judgment will be found to contain a full statement of all the material facts in evidence at the hearing.

1859. May 6, 7, 9.

Mr. Amphlett and *Mr. E. Macnaghten*, in support of the appeal. — The bill ought not at all events have been dismissed so far as it sought an injunction, for whether the Court can or cannot decree a specific performance of the charter-party against Curry, it has, we submit, power to restrain Curry and Gibson from using the vessel in a manner contrary to the terms of the agreement. The proposition stated by the Lord Justice KNIGHT BRUCE upon the hearing of the motion was, we submit, entirely in accordance with the law of the Court and with the authority of *Lumley v. Wagner*. (a) The Vice-Chancellor considered the decision in that case to proceed on the fact that Miss Wagner, by singing at another theatre than that at which she had agreed to sing, would inflict an injury beyond the loss of her services. But Lord ST. LEONARDS does not rest his judgment on any such ground. Suppose the great Eastern Ship Company had received money for the transport of troops to India, and had become insolvent, could not the Court have prevented the vessel from being otherwise used until the contract had been performed? In *Clarke v. Price*, (b) Price had not impliedly contracted not to furnish reports to any other publisher than the plaintiffs. The * principle of the case is the same as that of *Tulk v. Moxhay*. (c) * 286

If the argument for a defendant could prevail, a ship-owner would have only to mortgage his ship after entering into a charter-party, and would thus, by his own act, and notwithstanding notice to the mortgagee, defeat the whole object of the agreement. It is not necessary to discuss the question as to the specific performance of the charter-party, because the plaintiff will be satisfied with an injunction. But, in truth, the cases referred to as to building-contracts do not apply to the present. When the contract is sufficiently certain in its terms to be enforced, the Court will enforce it.

The objection that the Court could not make the defendants

(a) 1 De G., M. & G. 604.

(c) 2 Phil. 774.

(b) 2 Wils. 157.

send out the ship properly fitted or with a good crew is of no force, for such an argument might be used in any other case of specific performance. A failure to obey the order of the Court in these respects could be proved by evidence, just as any other disobedience might be, and might be visited with the same punishment. Moreover, a manager might be appointed if necessary. Nor is the objection well founded that the Court never decrees the specific performance of an agreement respecting the sale or use of chattels. If the purchase-money has been paid, the chattel is held to be subject to a trust, which is perhaps more correctly the ground of interference of the Court than that of specific performance in such cases. *Pooley v. Budd.* (a) As to Curry,

therefore, we are entitled to have a specific performance,
 * 287 or to have the trusts which are * attached to the ship carried into effect. As to Gibson, we have never contended for this ; but we are entitled to an injunction to restrain him from exercising his powers so as to prevent Curry, from performing his contract.

They also referred to *Doloret v. Rothschild*, (b) *Mosely v. Virgin*, (c) *Storer v. Great Western Railway Company*, (d) *Sanderson v. Cockermouth & Workington Railway Company*, (e) *Price v. Mayor, &c. of Penzance*, (g) *Lytton v. Great Northern Railway Company*, (h) *Buxton v. Lister*, (i) *Webster v. Dillon*. (k)

Mr. Rolt and *Mr. Bedwell*, for the defendant, Mr. Gibson. — This is a case in which damages at law would be sufficient remedy, nor would more be obtained than a pecuniary compensation if the injunction were granted. The injunction sought is entirely in the nature of specific performance, and this the Court will not decree where it has not the means of enforcing it. The Court will not attempt to do that indirectly which it cannot do directly. No case can be found of the specific performance of a charter-party, or of an injunction such as is here sought. Moreover, the delay in instituting the suit is of itself a sufficient bar

(a) 14 Beav. 34.

(b) 1 Sim. & Stu. 590.

(c) 3 Ves. 184.

(d) 2 Y. & C. C. C. 48.

(e) 11 Beav. 497.

(g) 4 Hare, 506.

(h) 2 K. & J. 394.

(i) 3 Atk. 383.

(k) 3 Jur. N. S. 432.

to any relief on the footing of specific performance. Then, with respect to the ground of trust on which it is now attempted to rest the case, there can be no trust of a ship, the recent Act having made no difference in the law in this respect.

* They referred to *Harnett v. Yeilding*, (a) *Adderley v. Dixon*, (b) *Cud v. Rutter*, (c) *Rayner v. Stone*, (d) *Flint v. Brandon*, (e) *Dietrichsen v. Cabburn*, (g) *Lumley v. Wagner*, (h) *Heathcote v. North Staffordshire Railway Company*, (i) *Pollard v. Clayton*, (k) *Orr v. Dickinson*, (l) *Hughes v. Morris*, (m) *M'Calmont v. Rankin*, (n) *Dresser v. Hoare*, (o) and 17 & 18 Vict. c. 34, §§ 38, 39, 43, 62, 65, 67, 100, 103.

Mr. Amphlett, in reply.

Judgment reserved.

May 27.

THE LORD CHANCELLOR. — The bill in this case was filed for the purpose of obtaining the specific performance of a charter-party, and also to restrain the mortgagee of the chartered vessel from interfering to interrupt the voyage for which she was engaged.

The facts of the case are rather complicated, but it will be necessary to state only such of them as will explain the grounds of my decision.

The defendant Curry, in the month of October, 1857, had contracted to purchase a vessel called the Allerton, which had been mortgaged to a Mr. Dickenson (a *member of *289 the firm of Bromley, Moore & Company) for 1935*l*. Before the purchase was completed, and on the 23d October, 1857, Curry entered into a charter-party with the plaintiff, by which it was agreed that "the Allerton," then in the port of Shields, should proceed to the Tyne and there load a full and

(a) 2 Sch. & Lef. 549.

(b) 1 Sim. & Stu. 607.

(c) 1 P. W. 570.

(d) 2 Ed. 128.

(e) 8 Ves. 159.

(g) 2 Phil. 52.

(h) 1 De G., M. & G. 604.

(i) 2 M. & G. 100.

(k) 1 K. & J. 462.

(l) 1 Johns. 1.

(m) 2 De G., M. & G. 349.

(n) 2 De G., M. & G. 403.

(o) 2 Jur. N. S. 1151.

complete cargo of coals, and therewith proceed to Suez, or so near thereto as she could safely get, and deliver the same. The freight, at 60*l.* sterling per keel, to be paid, one-third by the charterer's acceptance at three months, and one-third, by like acceptance, at six months from the sailing of the vessel from the loading port in Great Britain (the same to be returned if the cargo be not delivered at the port of destination), and the remainder by a bill at three months from the date of delivery at the charterer's office in London of a certificate of the right delivery of the cargo. The penalty for the nonperformance of the agreement the amount of the freight.

Curry was unable, from his own resources, to provide means for the completion of his purchase, and for the purpose of obtaining the necessary funds he agreed to mortgage the vessel to the other defendant Gibson for the sum of 1500*l.*

The mortgage to Gibson was executed on the 12th January, 1858, before Curry had become the registered owner of the vessel; and it contained a power of sale, which was not to be exercised for six months.

It was admitted that Gibson took this mortgage with a full knowledge of the existence of the plaintiff's charter, and there can be no doubt that the plaintiff knew the terms of the power of sale in Gibson's mortgage deed.

* 290 * On the 6th January, 1858, Dickenson sent his mortgage and a bill of sale executed to Curry to Heald & Co., of Newcastle, with instructions not to part with the bill of sale till the whole of the purchase-money was paid. On the same day Curry drew upon the plaintiff two bills for the stipulated proportions of the freight, which were accepted by him and returned to Heald & Co., with orders not to deliver them until the vessel had sailed.

On the 7th January, 1858, Gibson sent a Liverpool dock bond for 1200*l.* to Dickenson, for him to sell and apply the proceeds in part payment of the purchase-money for the vessel. The dock bond produced the sum of 1080*l.* Upon the receipt of this bond Dickenson sent instructions to Heald & Co. not to detain the bill of sale, and it was accordingly delivered by them to Curry on the 11th January, 1858.

On the 19th January, 1858, Curry was registered at Shields as the owner of the vessel, and on the following day the mortgage

to Gibson was registered at the same port.. The vessel, having received her cargo of coals, sailed on her voyage on the 29th January, 1858.

It had been arranged by Gibson and Curry with Heald & Co., that as soon as the vessel sailed they should get the plaintiff's bill discounted and pay the residue of Dickenson's mortgage out of the proceeds; and, accordingly, on the 30th January, the day after the sailing of the vessel, the discount of the bills was procured, and a sum of 735*l.* handed to Heald & Co. for Dickenson. Gibson gave his check for 120*l.*, and thus the mortgage-money due to Dickenson was fully paid.

The vessel, shortly after the commencement of her * voyage, met with bad weather, and was obliged to put * 291 into Portsmouth to be repaired.

The repairs amounted to the sum of 250*l.*, which was paid by Gibson.

The vessel then sailed again, but had not proceeded far before it became necessary to put into Penzance, where she arrived in a leaky condition on the 24th February. On the 2d March, the surveyor of the port ordered the cargo to be unloaded in order that the vessel might be repaired. The coals were accordingly taken out of the vessel and deposited in an enclosed yard.

On the 16th March, Matthews, a shipwright at Penzance, commenced the repairs by the order of Adamson, the master of the vessel. He soon, however, became dissatisfied with Adamson's responsibility; and, upon Gibson's refusal to be answerable for the repairs, they were stopped.

There is an entire blank in the evidence from this period down to the beginning of July. The plaintiff offers no explanation of his conduct during these three months. He was, of course, aware of the interruption of the voyage, and of his coals being landed and lying at Penzance, and yet he appears to have done nothing until the 2d July, when he wrote to Gibson the following letter of that date: —

“ Allerton.

“ DEAR SIR, — The delay in the despatch of this ship is becoming a very serious matter, and must be attended to. The owner, Mr. Curry, is and has now been detained at Genoa for months past for your benefit; and, as I cannot continue to be the

* 292 sufferer by this, I must beg of you to * see that immediate arrangements are made to despatch her; and I have no doubt that Mr. Matthews, of Penzance, will grant you any reasonable facilities to this end.

“ I await your reply, and am,

“ Yours truly,

“ W. H. DE MATTOS.”

This letter was not answered by Gibson till the 13th July, 1858, the day after the power of sale on his mortgage deed could be exercised, when he wrote and sent to the plaintiff the following letter:—

“ Allerton.

“ DEAR SIR, — I duly received your letter of the 2d inst., and it was my intention to have called upon you when I was in town, from whence I only returned on Monday; but I was so occupied that I had not time to do so. I can only repeat what I said at our last interview, that I am advised to sell the ship as she now is. Captain Curry will, I expect, be here in a day or two, when I have no doubt but he will make an arrangement respecting the ship which will be satisfactory both to you and Matthews of Penzance.

“ Yours truly,

“ G. T. GIBSON,

“ *Per* E. W. HARDY.”

It is to be observed, that it appears by this letter that there had been a previous interview between the plaintiff and Gibson, in which the plaintiff had, at all events, been informed (if not before) of the power of sale possessed by Gibson. Curry,
* 293 as Gibson anticipates in this * letter, did call upon the plaintiff afterwards (the exact time is not given), and he proposed either to carry the plaintiff's coals by a vessel called the Mary Ann “instead of the ‘Allerton,’” or to carry them by the “Allerton” if the plaintiff would advance some more of the freight in order to assist him in doing the requisite repairs. The plaintiff refused both these offers: the one respecting the Mary Ann, because he had no confidence in Curry, and did not wish to lose the benefit of his agreement for the Allerton; and the other,

because, although the plaintiff was willing to make the advance, it was only on condition that Curry would bring him a certificate of the vessel being in a complete state of repair and fit for sea, which he was unable to do. From this time there is again an unaccountable delay on the part of the plaintiff until the month of September, when, upon an apprehension (as it is said) that Gibson might exercise his power of sale without notice to the purchaser of the charter-party, he filed a bill on the 15th September against Gibson only, praying that he might be restrained from selling the vessel otherwise than subject to the burden of the charter-party.

The injunction was refused, during the long vacation, on the ground (as it is stated) of no notice of the intended application having been given.

The defendant Gibson then put in his answer on the 30th October, 1858.

By this answer it appeared that Matthews, the shipwright, claimed a lien upon the vessel for the repairs; that the vessel was unable to prosecute her voyage to Suez because Curry could not pay for the repairs, and because he had made default in payment of the mortgage-money to Gibson, and that Gibson intended to sell * the vessel under his power of sale, and * 294 without reference to the engagement under the charter-party, and with that view he had sent instructions to Matthews to allow the vessel to be removed out of dock and sent back to Newcastle. It was not stated in this answer of Gibson, that on the 18th October he had taken possession of the vessel, which he appears to have done. He afterwards authorized repairs upon her, which were completed, and he paid the sum of 860*l.* for these repairs to Matthews, whose lien was consequently withdrawn.

On the 19th of November the bill was amended, and Curry made a defendant. Specific performance of the charter-party was prayed against him, and it was also prayed that he might be restrained from permitting the vessel to remain at Penzance, or at any place other than Suez; and there was an additional prayer against Gibson that he might be restrained from removing the vessel to Newcastle or otherwise interfering to interrupt the voyage.

On the 25th of November the motion for an injunction was

made before Vice-Chancellor WOOD and refused; but, upon an appeal to the Lords Justices, they granted the injunction to restrain Gibson from removing the vessel. Upon that occasion Lord Justice TURNER intimated his opinion that the questions which would have to be determined upon the hearing of the cause would be: —

1st. Whether the plaintiff is entitled to a specific performance of the contract?

2d. Whether, if not so entitled, he may not, nevertheless, be entitled to an injunction to restrain a breach of the contract contained in the charter-party? And

* 295 * 3d. Whether the charterer of the vessel may not be entitled to the benefit of the equity which Curry might have against Gibson the mortgagee, to prevent his committing or compelling a breach of the contract?

These questions were all fully argued upon the hearing of the cause before the Vice-Chancellor, and, after carefully considering the case, his Honor gave judgment against the plaintiff, and dismissed his bill without costs as against Curry, and as to Gibson, with costs, except so far as they were occasioned by the motion for the injunction. The same questions have all been raised before me upon appeal from his Honor's decision.

In dealing with the case it will be necessary, in the first place, to consider the relative position of the several parties arising out of the different engagements with each other.

The charter-party is merely a contract for the conveyance to Suez, of a cargo of coals for the plaintiff, leaving Curry the complete ownership of the vessel, but subject to an engagement to carry the coals and to deliver them at their place of destination. This contract he is bound to perform, unless disabled by any of the causes excepted in the charter-party, and if his vessel sustains any injury from which repairs become necessary before she can prosecute her voyage, he must have these repairs done with all reasonable despatch. His engagement under the charter-party is one of which he cannot divest himself by the transfer of the vessel, nor would the assignment of the property in the vessel transfer to the assignee either the benefit of the obligation of the stipulations in the charter-party except through him. Gibson as

the mortgagee, though with full notice of the charter-party, * incurred no liability in respect of the contract with * 296 the plaintiff, nor was he bound to do any thing to forward its performance.

He is not the owner of the vessel (as all the Shipping Acts, from that in the reign of George 4th downwards, have always provided), and by the Act of 1854, he would have had a power of sale, although not expressed in the mortgage deed, but which he agreed to postpone for a period of six months. The highest right which the plaintiff could assert against him would be that he should not interfere actively to interrupt the prosecution of the voyage.

Under these circumstances, what course ought the plaintiff to have pursued upon the long detention of the vessel at Penzance, without any thing being done towards repairing her, so as to enable her to proceed upon the voyage? I apprehend that he was entitled to treat the unreasonable delay as a breach of the contract, for which he might have maintained an action; and that if it clearly appeared that Curry had no intention of putting the vessel into a condition to proceed upon her voyage, he would have been justified in engaging another vessel to carry his coals to Suez, and making Curry answerable for the damages which he had sustained.

But assuming that Curry had shown no disposition to fulfil his contract, but had passively permitted the vessel to remain unrepaired and in a state in which her further prosecution of the voyage was out of the question, is the plaintiff entitled to resort to a Court of Equity to compel a specific performance of the charter-party?

A contract of this kind consists of various stipulations * as to many of which it is beyond the power of the Court * 297 to enforce performance. The vessel must be in a fit state to perform the voyage; she must be provided with a skilful master and a competent crew; she must be found in all things necessary, and she must commence and pursue her voyage with reasonable despatch and without deviation. How can the Court decide upon the skill of the master, the competency of the crew, or the sufficiency of the vessel, so as to compel the observance of the contract in all these particulars? Even with respect to enforcing the repairs of the vessel, although it may be conceded

that if an agreement for repairs is in its nature defined, in the words of Lord ROSSLYN, in *Mosely v. Virgin* (a), "perhaps there would not be much difficulty to decree specific performance," yet the repairs which are to be done under a charter-party being such as will render the vessel seaworthy, the contract is far too uncertain and indefinite to enable the Court to carry it out.¹

So far therefore as Curry is concerned, who has been merely guilty of omission, and has done nothing actively to hinder the voyage, the bill cannot be maintained either to enforce specific performance of the charter-party, or to restrain him from permitting the vessel to remain at Penzance, or any other place than Suez, which is, in other words, to require him to perform the voyage, and to do all acts which are necessary to put the vessel in a seaworthy state for the purpose. We may, therefore, confine our attention entirely to the case of Gibson, and to the relief which is prayed against him. Ought the Court, under all the circumstances, to interfere to restrain him from exercising his rights under his mortgage, and thereby preventing the performance of the contract by Curry?

I will first of all consider what the case would have
 * 298 * been as against Curry, if he himself, instead of remaining passive, had done or threatened to do some act which would have been a breach of his engagement to employ the vessel in the plaintiff's service. Could the Court have restrained him, and so, indirectly perhaps, have compelled him to perform his contract?

It is said that there was no negative stipulation in the charter-party which could be thus enforced, for that there was nothing to prevent Curry carrying coals in his vessel for other persons; but I agree with Vice-Chancellor Wood's view of the case of *Webster v. Dillon*, that affirmative agreements may involve a negative; and when by this charter-party Curry undertakes to carry to Suez a full and complete cargo of coals for the plaintiff, it necessarily implies that if the plaintiff provides a full cargo, the vessel shall not be employed for any other person or purpose. It is also said that any other vessel will carry the plaintiff's coals

(a) 3 Ves. 185.

¹ See *Kerr Inj.* 495, 525; *Mann v. Stephens*, 15 Sim. 379; *Bernard v. Meara*, 12 Ir. Ch. 389; *Armstrong v. Courtney*, 15 Ir. Ch. 138.

just as well as the Allerton, that the charter is a mere contract to deliver goods at a certain time and place, and that Lord COTTENHAM, in *Heathcote v. The North Staffordshire Railway Company*,^(a) puts this very case as one in which the Court will not interfere.

But it seems to me that these arguments are not well founded. A person who hires a vessel under a charter-party does so not merely from a wish to have his goods conveyed to a particular place, but upon a careful choice of the vessel itself as best adapted for his purposes. Many considerations may influence him in the selection, and after these have determined him to bind himself and the owner of a particular vessel in a contract for its employment, he would be surprised to be told that all he wanted was to have his goods conveyed to their destination, and that it * was immaterial to him in what manner, or by * 299 what conveyance this was accomplished. I think that a vessel engaged under a charter-party ought to be regarded as a chattel of a peculiar value to the charterer, and that although a Court of Equity cannot compel a specific performance of the contract which it contains, yet that it will restrain the employment of the vessel in a different manner, whether such employment is expressly or impliedly forbidden, according to the principle so fully expressed in the case of *Lumley v. Wagner*. In such cases the Court repudiates the idea of indirectly compelling performance where it could not directly decree it. It gives all the relief in its power, without looking to the effect which may be ultimately produced by the restraint which it places on the party who is disposed to break his contract.

I have no doubt that the plaintiff would have been entitled to the interference of the Court to this extent, if the case had been the one supposed, of Curry attempting to employ the vessel in a manner not in accordance with the terms of the charter-party. But Gibson's position is entirely different from Curry's. He is not bound by any engagement to the plaintiff. It is true that he took his mortgage with a full knowledge of the charter, and that he must, therefore, abstain from any act which would have the immediate effect of preventing its performance. If, for instance, when the vessel put into Penzance, and before a reasonable time for Curry's doing the repairs had elapsed (supposing his power of

(a) 2 Mac. & G. 112.

sale to have been then available), he had determined to exercise it, expressly declaring that he meant to conceal the charter from the purchaser, or much more certainly if he had endeavoured to hinder the voyage by sending the vessel in a different direction,

I think that he might have been restrained from doing
* 300 such acts as these by injunction. But Gibson * has not

in any way interfered with the performance of the charter-party until it was evident that Curry was wholly unable to perform it. On the contrary, he assisted Curry in carrying it out by advancing money for the repairs at Portsmouth, by which the vessel was again in a condition to proceed upon her voyage. He was not bound to provide for the repairs at Penzance, nor would it have been reasonable to expect him to do so before his power of sale became operative. But in the mean time what was the plaintiff doing? Literally nothing. He took no steps whatever to procure the repair of the vessel, from her arrival at Penzance in February until his letter to Gibson in July, nor again from that month till September. He must have known perfectly well that Curry was wholly without means to enable him to do the repairs. On the other hand, what was Gibson to do? He had advanced the money on his mortgage, and he had also paid 250*l.* for repairs. If the vessel had remained in possession of Curry, it was clear that no repairs would have been effected, and without them the vessel could not put to sea. The actual performance of the contract, as between the plaintiff and Curry, was therefore virtually at an end, when Gibson, on the 18th of October, 1858, took possession of the vessel, and sometime afterwards repaired her at an expense of 850*l.*

In order to entitle the plaintiff to an injunction against Gibson, he must show that Gibson has done, or threatened to do, some act which has interfered with the performance of the contract of which he had had notice. But does any one believe that, if Gibson had not interfered at all, Curry could possibly have effected the repairs and enabled the vessel to proceed to sea? If not, how can

it be said that Gibson has done any thing to hinder a voyage
* 301 which had been completely stopped by Curry's utter * inability to put the vessel in a condition to perform it, before any active interference by him.

I think that, under these circumstances, it would be most

unjust to restrain Gibson from availing himself of any rights which his possession of the vessel and his title as mortgagee have enabled him to exercise.

It is only necessary to advert to the question of the possible equity which the plaintiff might derive from Curry, to prevent Gibson's doing any act to hinder Curry from performing his contract, for the purpose of dismissing this question in a word. How could Curry succeed in restraining Gibson from exercising any right as mortgagee, and thereby interfering with the performance of a contract which Curry was wholly incapable of performing? No equity could possibly exist between Curry and Gibson under such circumstances, and therefore the plaintiff can derive no benefit in this manner through Curry against Gibson.

I am of opinion that the Vice-Chancellor's decree must be affirmed and the appeal dismissed with costs.

1859. May 28, 30. June 1. Before the Lord Chancellor Lord CHELMSFORD.

After a separation between a husband and wife an action was brought by the wife's mother against the husband for necessaries supplied to the wife, and was settled by arbitration. Under the award two deeds were executed, by one of which a previous post-nuptial agreement and warrant of attorney were recited, and in pursuance of them an annuity was made payable to the wife for her separate use out of trust property to which the husband was beneficially entitled. By the other deed covenants were entered into by trustees on behalf of the wife that she would not molest the husband, and for indemnifying him against her debts, and that out of the annuity granted by the other deed the wife would support the children whom the husband covenanted to leave under her charge; and there was a proviso in the latter deed making it void on the husband and wife again cohabiting. The wife's conduct rendered her unfit to have the care of the children. *Held*, —

1. That the annuity deed was not merely voluntary or incomplete, but created an effectual trust not affected by the wife's conduct.¹

¹ See *Kekewich v. Manning*, 1 De G., M. & G. 176, note (1), 188, notes (1) and (2); *In re Way's Trust*, 2 De G., J. & S. 365; 2 Sugden V. & P. (8th Am. ed.) 721, note (b').

2. That the two deeds were not so connected as to render the validity of the annuity deed dependent on that of the other.¹
3. That after subsequent cohabitation the children had no title to maintenance out of the annuity.

THIS was an appeal from the dismissal by the Master of the Rolls of the bill of a married woman against her husband and trustees of property, to which the husband was beneficially interested, seeking to have the trusts of a post-nuptial settlement carried into effect.

The settlement was dated 31st of December, 1850, and by it an annuity of 60*l.* was made payable to the plaintiff for her life, out of certain copyhold and leasehold estates of her husband, the defendant Charles Richard Crouch.

The husband derived these estates under the will of his father, who devised them to trustees (of whom Mr. Waller, one of the defendants, was the survivor), in trust to pay off certain mortgages; then to pay certain annuities (of which one for 80*l.* to the testator's widow was still payable), and ultimately to the defendant, Charles Richard Crouch, when he should attain the age of twenty-five years.

* 303 * The plaintiff intermarried with the defendant Charles Richard Crouch on the 1st of September, 1845.

There were two children of the marriage, Thomas Richard Jones Crouch and Frances Sarah Anne Crouch, who were infants and defendants. On the 5th of July, 1848, which was after Charles Richard Crouch attained twenty-one, but before he was twenty-five, an agreement for a settlement was made, whereby he agreed with two of the defendants, Mr. Sidney and Mr. Blight, to make a settlement of property to the extent of 60*l.* per annum, in trust for the plaintiff for her life for her separate use, and after her death for himself for life, with subsequent trusts for their children.

He also gave a warrant of attorney to confess a judgment for 2400*l.*, with a defeasance, reciting that the warrant of attorney was given to secure 1200*l.*, and providing that execution should not be issued until default should be made in executing the settlement for a week after he attained twenty-five years.

Some time after the marriage differences arose between the parties and they separated, the plaintiff taking with her the two

¹ See *post*, 313, note (1).

children, and going to reside with her mother. No allowance was made by the husband for her maintenance or for that of the children, and the plaintiff's mother, having provided them with necessaries, for which he refused to pay, brought an action against him.

The cause and all matters in difference were referred, under an order at Nisi Prius, to the arbitration of Sir Walter Riddell, who awarded that the deed in question and the separation deed should be executed.

* They were both dated the 31st of December, 1850. The * 304 former, which was made and executed between and by Mr. Crouch of the first part, the plaintiff of the second part, and Messrs. Sidney and Blight of the third part, recited the will of Mr. Crouch's father, the marriage of Mr. and Mrs. Crouch, and that there were two children of it and no more. It also recited the agreement of the 5th of July, 1848, and that it had been agreed that the same should be carried into effect with some variations by the settlement now in statement, which was to be deemed the performance and fulfilment of the agreement of 1848. It then recited the order at Nisi Prius, the reference to arbitration, and the award. It then witnessed, that in pursuance of the agreement of 5th of July, 1848, and in obedience to the award, Crouch covenanted with Sidney and Blight that he would, at the Court to be holden for the manor of Tottenham next after the week in which he should attain the age of twenty-five years (subject to the several annuities bequeathed by his father's will, and to the trusts thereof then remaining unexecuted), surrender or cause to be surrendered into the hands of the lord or lady, lords or ladies, of the said manor, certain messuages or tenements which the deed particularly described, to the use of the defendants, Sidney and Blight, their heirs and assigns, according to the custom of the manor, upon the trusts thereafter mentioned. And the deed further witnessed, that Crouch thereby granted and assigned unto, Sidney and Blight, their executors, administrators, and assigns, certain leasehold hereditaments, which it particularly described for the residues of the several terms subsisting therein on the trust thereafter mentioned. And it was agreed and declared that the trustees should stand possessed of the copyhold and leasehold premises, and out of the rents, issues, and profits thereof, or by demising, mortgaging, or selling the same, or

* 305 any part * thereof, should pay certain charges and annuities therein particularly mentioned ; and in the next place pay unto the plaintiff, her executors, administrators, and assigns, during her life, the annual sum of 60*l.* for her sole and separate use, independently and exclusively of Crouch, and of his debts, control, interference, and engagements, but so that the plaintiff should not have power to deprive herself of the benefit thereof by sale or mortgage, or otherwise in the way of anticipation ; and after the decease of the plaintiff, if she should die in the lifetime of Crouch, but not otherwise, then to raise an annuity of 50*l.* for the benefit of the present or any future children of Crouch by the plaintiff, and subject as aforesaid, to stand possessed of the copyhold and leasehold hereditaments, upon trusts for sale ; and the proceeds of the sale and the property until sold were, subject to the aforesaid trusts, to be held in trust for Crouch for his life, with remainder for the plaintiff for her life, with remainder for their children “now born or hereafter to be born” in the lifetime of Crouch, or in due time after his decease, in such shares and manner as Crouch and his wife should appoint, and subject thereto, equally among the children who should attain twenty-one, or, being daughters, should attain twenty-one or marry.

The other deed, dated the same 31st of December, 1850, was also made between Crouch of the first part, the plaintiff of the second part, and Sidney and Blight of the third part. It recited the agreement of the 5th of July, 1848, the Nisi Prius order, and the award and the deed of settlement just stated of even date. It further recited that unhappy differences subsisted between Crouch and the plaintiff, and that they had agreed to live separate and apart, and had agreed to enter into the

* 306 arrangement intended to be effected * by the present deed.

It then witnessed that Crouch covenanted with Sidney and Blight that it should be lawful for the plaintiff to live separate and apart from him without molestation or disturbance on his part, and that it should be lawful for her and any persons whom she might nominate to have the care, custody, education, and control of the two children during their minority, and that Crouch would not attempt to remove them from the care, custody, and control of the plaintiff, she taking upon herself and bearing the charges and expenses of their maintenance and education. And Sidney and Blight covenanted with Crouch that the plaintiff

would not molest or disturb him, and that they would indemnify him against all debts incurred by the plaintiff since 2d of March, 1848 (but only so long as the annuity of 60*l.* should be regularly paid to the plaintiff) on account or by reason of the board, lodging, clothing, maintenance, and education of the children, or either of them, the costs, charges, and expenses whereof it was intended and agreed between the parties should be exclusively paid and borne by the plaintiff out of her separate estate while and so long as the annuity of 60*l.* should be regularly paid to her, and that the trustee might retain out of such annuity all sums which they might be obliged to pay on account of any such debt or liability. And the indenture contained a proviso that nothing therein contained should be construed to prejudice or affect any provision or settlement made or to be made for or for the benefit of the plaintiff previously or subsequently to her said marriage, and a proviso making the deed void if the plaintiff and her husband should at any time thereafter, with their mutual consent, come together and cohabit as man and wife.

Some years after these deeds were executed, the * event * 307 provided for by the deed of separation occurred — the parties lived together again; but they again separated in the year 1857. Since that period the plaintiff had been leading a profligate and abandoned life, and had become an inmate of the Gravesend Union Workhouse.

The plaintiff originally filed her bill against the defendant Waller to obtain payment of her annuity.

The Master of the Rolls made a decree in her favour. But, upon appeal to the Lords Justices, they considered that the infant children of the plaintiff ought to be made parties to the suit, and gave her leave to amend the bill accordingly.

The bill was amended, and upon the case being brought again before the Master of the Rolls, his Honor was of opinion that the deeds of settlement and of separation must be taken together as one transaction; that the clause in the separation deed, by which the father gave up the care and custody of the children to the mother, to be maintained and educated by her, was against public policy and void, and that this vitiated both the deeds, which must stand or fall together, and he therefore dismissed the bill.

Pending the appeal, the next friend of the plaintiff refused to

act further in that capacity, and she obtained leave to appeal *in formâ pauperis* without a next friend. (a)

Mr. R. Palmer and *Mr. H. W. Cole*, for the appellant. — The questions for decision are, first, whether the settlement * 308 * of 1851 is illegal, on the ground that it formed part of an arrangement, by another part of which the custody of the children is surrendered to the mother, who is an unfit person to have such custody; secondly, whether, if it is not illegal and void, the plaintiff has by her conduct forfeited her right to the annuity; thirdly, whether the deed is ineffectual, as being voluntary and incomplete; fourthly, whether under the provisions of the separation deed the children were not entitled to be provided for out of the annuity. Upon the first question we submit that the settlement is a perfectly distinct transaction from the separation deed, which it does not recite, and to which it does not even in any manner refer. The award and the two deeds were, it is true, historically part of the same transaction; but they had different objects and depend on different considerations, and one may be good and the others bad. With respect to the second point, even if the charges of misconduct could be established, they would be perfectly immaterial, and could not affect the plaintiff's right under the deed. On the third point there is no pretence for saying that the deed was voluntary, it was part of a compromise of proceedings under which substantial damages could have been recovered against the husband, but in which it is sufficient if there was a possibility of such damages being recovered; nor if the settlement were merely voluntary could the husband resist the performance of the trusts declared by it on that ground, as it is a complete disposition of his beneficial interest. And with reference to the claims of the children, those claims depended on the separation deed, which, by the express terms of it, is no longer operative.

They referred to *Vansittart v. Vansittart*, (b) *Wilson* * 309 * *v. Wilson*, (c) *Elworthy v. Bird*, (d) *Bennett v. Cooper*, (e) *Wilson v. Mushett*, (g) *Randall v. Gould*, (h)

(a) See *ante*, p. 43.

(e) 9 Beav. 252.

(b) 2 De G. & J. 249.

(g) 3 B. & Ad. 743.

(c) 1 H. L. Cas. 538.

(h) 8 E. & Bl. 457.

(d) 2 Sim. & Stu. 372.

Ward v. Audland, (a) Seagrave v. Seagrave, (b) Jee v. Thurlow. (c)

Mr. Selwyn and *Mr. W. D. Lewis*, for the defendant, *Mr. Crouch*. — The award and the two deeds were one transaction, and the trusts of the annuity, declared by the separation deed, shows what the intention of the parties was. The plaintiff, by her misconduct, has disqualified herself from performing this trust, and the contract for giving up the children to her custody is illegal, and one which the Court will not perform. But if it were not, it is merely voluntary, and is executory except as to the leaseholds, for there is a covenant for the surrender of the copyhold portion of the property.

They referred to *Walrond v. Walrond, (d) Sidney v. Sidney, (e) Fletcher v. Fletcher, (g) Mornington v. Keane, (h) Jefferys v. Jefferys. (i)*

Mr. H. R. Bagshawe and *Mr. Roche*, for the trustees.

Mr. Cole, in reply.

Judgment reserved.

June 1.

The Lord Chancellor, after stating the facts, said: —

The agreement of 1848 for a post-nuptial settlement * being voluntary, although for a meritorious considera- * 310 tion, could not have been enforced according to the rule as laid down in *Jefferys v. Jefferys, (i)* but the warrant of attorney, to secure the performance of the agreement, although a voluntary one, might have been available at law indirectly to compel its performance.

In *Gray v. Hall (k)* Justice PATTESON said: “I cannot find

(a) 16 M. & W. 862.

(b) 13 Ves. 439.

(c) 2 B. & C. 547.

(d) Johns. 18.

(e) 3 P. Wms. 269.

(g) 2 Cox, 99.

(h) 2 De G. & J. 292.

(i) Cr. & Ph. 138.

(k) 5 Dowl. & L. 425.

any case, nor was any cited in the argument, to show that a want of consideration will vitiate a warrant of attorney. There are undoubtedly cases in which warrants of attorney have been set aside for defective consideration, such as fraud, illegality, &c., but none in which mere want of consideration has been held sufficient."

The plaintiff was therefore in a situation in which, although she could not have compelled a settlement in equity, she might, through her trustees, have rendered the warrant of attorney available after her husband attained twenty-five, which he did in the year 1851.

In support of his Honor's decree it has been insisted that the settlement was voluntary and is executory, and that, this being virtually a suit for its specific performance, if there is any one provision in it which is illegal, according to *Vansittart v. Vansittart*, (a) and *Walrond v. Walrond*, (b) it must altogether fail of effect.¹

But I cannot look at this deed in the light of such a voluntary deed as a Court of Equity would not enforce. The husband was bound by the judgment under the warrant of attorney
 * 311 upon which execution might have * been issued against him after he attained the age of twenty-five. He was the defendant also in an action brought by the mother of his wife for necessaries supplied to her and to the children.

For the purpose of avoiding a trial of the action, he consented to a reference of all matters in difference, and that the arbitrator might deal with the warrant of attorney, and direct what acts, deeds, and matters should be made, done, and executed between the parties. The arbitrator ordered the deeds in question to be executed.

If the defendant had disobeyed the order, he would have been liable to an attachment. How then can deeds executed upon such consideration and under such circumstances be considered to be voluntary, so that a Court of Equity should refuse its aid to carry them into effect? On this ground, therefore, even if the deeds were executory, there would be no objection to the Court enforcing their specific performance.

(a) 4 K. & J. 62; 2 De G. & J. 249 [note (2)].

(b) Johns. 18.

¹ See *Perry Trusts*, § 97, and cases in note (3).

But I do not think that the defendants have established that the deeds are mere agreements which require the assistance of the Court to perfect them, or that they are executory in any other sense than that in which any trust deed may be so considered, where the aid of the Court is necessary to compel the trustee to do his duty.¹

The defendant Crouch has an absolute equitable interest in the copyholds and leaseholds under his father's will. This interest he has charged with the annuity in question to his wife. Waller is the trustee of the defendant Crouch of these estates, subject to the mortgages and to the annuities charged upon some portions of the property. He is bound in equity by the deed of his *cestui que trust* to apply the rents and profits * to * 312 the payment of this annuity to the plaintiff. This case, therefore, is not like *Jefferys v. Jefferys*, (a) where a father, by a voluntary settlement, covenanted to surrender copyhold estate to trustees in trust for the benefit of his daughters, and where the Court refused to decree that the widow should surrender the copyholds because the settlement was voluntary.² There something was to be done before the trusts of the settlement, as to the copyholds, could come into existence, namely, a surrender had to be made to the trustees; here the copyholds are vested in the trustees, and no aid of the Court is wanted in this respect, the equitable right of the plaintiff attaching upon the trustees' estate by the deed itself of the *cestui que trust*.

The deed then being neither voluntary nor executory, the only question which remains is as to its validity.

In accordance with the view taken by the Master of the Rolls, it has been contended that the award and the two deeds — of settlement and of separation must all be regarded as parts of one entire transaction; and that the clause in the deed of separation, as to the maintenance and education of the children, being void, and that deed providing for the 60*l.* being applied to those purposes, although the deed of settlement, in giving the 60*l.* per annum, is silent as to its application, yet that it must be read with the explanation afforded by the award and the deed of separation; and that thus the annuity will appear to have been

(a) Cr. & Ph. 138.

¹ See Perry Trusts, §§ 98, 99; Lewin Trusts (5th Am. ed.), 56, 57.

² See Perry Trusts, §§ 107–111; Lewin Trusts (5th Eng. ed.), 64–66.

intended for the illegal object of the maintenance and education of the children, abandoned (against public policy and the duty of the father) to the care and custody of the mother.

The deeds in question are certainly, in one sense, parts
 * 313 * of one entire transaction. They originated in the disputes and differences between the parties, and they were both of them the result of an award which was intended to decide all these differences and disputes. But it does not, therefore, follow that they are so inseparably united and interwoven with each other that if one part of the transaction fails the whole must fail together.¹ Even in the same deed, if there is a clause which is illegal, yet if it is independent, and, as it were, insulated from the other parts of the deed, it will not vitiate the rest.

Now the deed of settlement does not recite the deed of separation. It appears to be wholly independent of that deed, and to have no reference to it. It is founded on the agreement of the 5th of July, 1848, and recites that it is "to be deemed to be the performance and fulfilment of that agreement."

The annuity is given to the plaintiff absolutely for her life, and there is no stipulation that it is to cease upon future cohabitation. On the contrary, such an event seems to be contemplated in the provision which the deed makes of an annuity for present and future children, and also for the application of the rents and profits, after the death of the husband and wife, "to the children born or to be born." I may say, with the Court in *Randle v. Gould*, (a) "It is not merely an allowance to her while she lives separate from her husband; it was absolutely to be paid to her by way of a provision during the term of her natural life, not being suspended or reviving as she should live with him or leave him."

But it is said that although the deed of settlement is
 * 314 * in itself free from objection, yet that it is to be explained by the award, and to be coupled with the deed of separation; and that in this manner it will appear that the 60*l.* annuity, though absolute in the deed of settlement, was clothed with a

(a) 8 E. & Bl. 469.

¹ See Chitty Contr. (10th Am. ed.), 94, and cases in note (x), 95; *Makepeace v. Harvard College*, 10 Pick. 302; *Ewer v. Myrick*, 1 Cush. 16, 22; *Hunt v. Frost*, 4 Cush. 54; *Casey v. Holmes*, 10 Ala. 776; *Sewall v. Henry*, 9 Ala. 24; *Whitehurst v. Boyd*, 8 Ala. 375.

trust as to the maintenance of the children which rendered it illegal.

I am at a loss to understand how the recitals in the award can be any evidence at all to explain the deed, though it was executed "in obedience to it," — much more how they can be evidence against the plaintiff, who was no party to the order of reference. Nor does the particular recital, on which the defendant relies, appear to me to assist his case.

It does not say that the 60*l.* per annum is given to the plaintiff for the maintenance of the children, but that it is agreed that she shall maintain the children out of the provision made for her by the indenture of settlement.

But even if it be assumed that the sole object and intention of both deeds were that the children should be maintained by the mother out of the 60*l.* per annum, there is nothing in either of them to show that if she failed to maintain them, the 60*l.* was no longer to be paid. If it was intended that the whole arrangement should be entire and dependent, why were two deeds executed, and why was not the deed of settlement made conditional like the deed of separation?

In the deed of separation there is a covenant by the trustees to indemnify the husband against the debts of the wife so long as the annuity of 60*l.* shall be regularly paid; and it is also declared that it is intended and agreed that the maintenance of the children "shall be *exclusively paid and borne by the *315 plaintiff out of her separate estate while and so long as the annuity of 60*l.* shall be regularly paid to her as aforesaid.

The effect of this covenant is not to exempt the husband from paying the 60*l.* if the wife does not maintain the children, but to give him the benefit of the covenant of the trustees if he pays and she refuses to maintain.

If the separation deed and the deed of settlement were intended to be one transaction, it is difficult to understand why the provisos were inserted at the end of the deed of separation, and no corresponding ones in the settlement deed. By one of such provisos it is declared that nothing in the deed of separation contained shall affect any provision or settlement made subsequently to the marriage.

The contemporaneous deed of settlement is previously recited, and there was no other provision or settlement but the one in

question, which was made subsequently to the marriage. This being so, the deed of separation contains an express provision that it is not to prejudice or affect the deed of settlement. Again, the last proviso is that in case the defendant Crouch and his wife should at any time thereafter, with their mutual consent, come together and cohabit as man and wife, all the covenants thereinbefore contained shall be void. This proviso is expressly confined to the separation deed, and does not touch the deed of settlement. If they were intended to stand or fall together, why was that proviso thus limited?

The separation deed then is conditional, the deed of settlement is absolute. The event contemplated by the *
* 316 proviso in the separation deed having occurred by the parties cohabiting again by mutual consent, the deed of separation has determined, and can never be revived, but the deed of settlement remains upon its own absolute and independent grounds.

Of course all arguments derived from the immoral conduct of the wife, of her unfitness to perform the trust delegated to her for the maintenance and education of the children, is, upon this view of the case, entirely out of the question, and also the suggestion that by allowing the deed of settlement to continue after the separation deed has been determined, the Court would be virtually sanctioning an agreement for a second separation.

My conclusion upon the whole case is that the provision in the deed of settlement of the annuity of 60% for the plaintiff is absolute and indeterminable, but that upon it an agreement is engrafted that while the parties live separate, the plaintiff, out of her annuity, shall maintain the children; that this agreement was of a temporary nature, and ceased upon the renewal of cohabitation, but that the settlement itself, which was subject to no condition, continues, and that the wife is still entitled to the benefit of it. I do not myself perceive the inconsistency suggested, of the wife, after the cohabitation renewed, being entitled to receive the entire annuity, without the burden of maintaining the children. But however unreasonable this provision may seem, it stands upon the express terms of the deed of settlement, and the charge which was attached to the annuity by the deed of separation was removed by the defendant consenting to cohabit again with the plaintiff, and thus himself putting an end to the condition upon which this charge depended.

* I am of opinion that the plaintiff is entitled to maintain her suit for the annuity of 60*l.*, and that her appeal ought to be allowed. * 317

The decree must declare that the infants are not entitled to any interest in the annuity of 60*l.* In other respects it will follow the decree of 30th of March, 1858.

No receiver will be appointed, but the defendant Mr. Waller will continue to receive the rents and profits, and apply them in payments, first, according to the trusts of the will, and then to the plaintiff.

In the Matter of PAUL AMEDEE FRANCIS COUTTS STUART, a Lunatic, and of The TRUSTEE ACT, 1850.

Ex parte JOHN ROWLANDSON MARSHALL.

1859. May 30. Before the Lord Chancellor Lord CHELMSFORD.

Where a mortgage in fee had been paid off to the mortgagee's executor, and a petition was presented under the Trustee Act, 1850, by the mortgagor, for a reconveyance from the mortgagee's heir, who was a lunatic, or for a vesting order: *Held*, that the mortgagor must pay the costs of the proceeding.

THIS was the petition of a mortgagor for a vesting order, or a reconveyance revesting in the petitioner the legal estate of freehold property, a mortgage on which had been paid off, and the only question was as to the costs of the application.

By the mortgage, which was dated the 30th of August, 1854, and made between the petitioner of the one part and Lord Dudley Stuart (since deceased) of the other part, the hereditaments in question were conveyed to the *late * 318 Lord Dudley Stuart in fee, subject to a proviso for redemption on payment of 5000*l.* and interest.

Lord Dudley Stuart died on the 17th of November, 1854, having made a will and codicils, but without having thereby or otherwise disposed of the legal estate in the mortgaged premises, and leaving the above-named lunatic his heir-at-law. The money due on the mortgage had been paid to the mortgagee's executors.

The petition prayed that the costs of and incidental to it might be paid out of Lord Dudley Stuart's estate.

Mr. Kay, in support of the application, referred to *Skipp v. Wyatt*, (a) *Ex parte Brydges*, (b) *Wetherell v. Collins*, (c) *Martin's Case*, (d) *Capper v. Terrington*, (e) *Re Radcliffe*, (g) *Ex parte Richards*, (h) *Re Marrow*, (i) *Re Lewes*, (k) *Re Townsend*, (l) *Re Wheeler*, (m) *Ex parte Barnes*, (n) *Re Biddle*, (o) *Hawkins v. Perry*. (p)

The Lord Chancellor referred to *Ex parte Clay*. (q)

Mr. Beales, for the respondents, was not called upon.

THE LORD CHANCELLOR. — I am bound entirely by the * 319 authority of *Ex parte Clay*, * which has, moreover, reason to recommend it. All the other authorities which have been referred to are distinguishable from this case. If the matter had been *res integra*, and if it had never been decided that when a mortgagee became lunatic the costs of a petition for a reconveyance should come out of the lunatic's estate, I should have thought that the ordinary rule of the mortgagor paying all the expenses of the reconveyance ought to be followed, and that, although the expense of the reconveyance is in such a case increased by the act of God, it would still be within the same principle, and would be properly payable by the mortgagor. Several cases, however, have now decided that where a petition is presented by the committee of a lunatic mortgagee as well as by the mortgagor, and the estate of the mortgagee is beneficially interested by reason of the mortgage money remaining unpaid, the Court will order the expenses to be borne by the estate of the lunatic. But Judges have expressed their reluctance so to

(a) 1 Cox, 353.

(b) Cooper, 290.

(c) 3 Madd. 255.

(d) 5 Bing. 160.

(e) 1 Coll. 103.

(m) 1 De G., M. & G. [434 (Am. ed.), note (2), and cases cited].

(n) 17 Law J. 436.

(o) 23 Law J. Ch. 23.

(q) Shelford on Lunacy, p. 510 (2d ed.).

(g) 22 Beav. 201.

(h) 1 Jac. & W. 264.

(i) Cr. & Ph. 142.

(k) 1 Mac. & G. 23.

(l) 1 Mac. & G. 686.

(p) 25 Law J. Ch. 656.

decide, and have said that if the matter had been *res integra*, they would not have so decided. Lord ST. LEONARDS, in *Re Wheeler*, decided as he did on authority merely, and with reluctance, and I am not disposed to follow *Re Wheeler* one step beyond the limits to which it extends. I consider this case distinguishable from it. In the present case, the petitioner prays that the costs may be paid out of the estate of the mortgagee. This very question has been decided by Lord LYNTHURST in *Ex parte Clay*, which was not brought to the attention of the Lords Justices in the cases before them which have been referred to. I have no power under this petition to direct (as I am asked to do) payment of costs by the mortgagee's executor out of the mortgagee's estate, and if had, I think that I ought not to exercise it. The mortgagor must pay the costs.

Ordered accordingly.

* In the Matter of THE MEXICAN AND SOUTH * 320
AMERICAN COMPANY.

ASTON'S CASE.

1859. June 1. Before the LORDS JUSTICES.

Whatever the rule may be as to the right of a witness to decline answering a question, on the ground that it may tend to criminate him, without giving any reason why it should tend to do so,¹ he will be compelled to answer, where he gives his reason, and such reason is insufficient.

A company, whose shares were made transferable by delivery of the certificates, is not on that ground illegal by the common law,² and the fact that the shares of such a company, formed before 7 & 8 Vict. c. 110, have become vested in other persons since the passing of that Act, does not make it subject to the provisions of that Act.

THIS was a motion by Mr. Aston, a stockbroker, to discharge an order of the Master of the Rolls, directing him to attend at his own expense before the examiner, that he might be further examined on behalf of the official manager in the winding-up of

¹ See 1 Dan. Ch. Pr. (4th Am. ed.) 564, note (2).

² See 1 Lindley, Partn. (Eng. ed. 1860) 152, 599.

this company. During the course of his examination, the following questions had been asked, his replies to which were as given below:—

“Have you ever bought scrip certificates or shares in this company?”

Answer. “Never for myself; and as I am advised that the company is illegal, and I may render myself liable to criminal proceedings or to penalties, I decline to answer further.”

“Have you ever bought shares for other persons?”

Answer. “I decline to answer that question, on account of the company’s illegal proceedings, fearing the consequences I have already stated. I have none now in my possession.”

“Have you ever had any scrip certificates or shares of the company in your possession?”

* 321 * *Answer.* “I decline to answer that question.”

The Master of the Rolls, on the hearing of a summons adjourned into Court on the 12th of May, 1859, held that Mr. Aston was bound to answer further, and made the order now appealed from.

The company was formed in 1835, with the object of promoting mining operations in Mexico and South America. No deed of settlement was executed, but scrip certificates were issued, on the back of which was printed the original prospectus, stating the proposed capital to be 100,000*l.*, in 10,000 shares of 10*l.* each, with powers to increase it. Nothing was said in the prospectus as to the mode of transferring shares, but the practice was to treat them as passing by the delivery of the scrip certificates, which ran as follows: “The holder of this certificate having paid 5*l.* to the directors of the Mexican and South American Company will be entitled to five shares on his making the following payments, &c.” In 1852 the directors called in these scrip certificates, and issued certificates in the following form: “The holder of this certificate is entitled to five shares of 10*l.* each in the Mexican and South American Company, on which 9*l.* per share has been paid.” The company was never registered under 7 & 8 Vict. c. 110, and the shares had to a considerable extent changed hands after the passing of that Act. On the 12th of February, 1855, a special general meeting was called, at

which a resolution was passed, authorizing the directors to create 10,000 additional new shares of 10*l.* each, which were to stand in all respects on the same footing as the original shares, and to carry dividends from the dates of issue. These new shares were accordingly issued. On the 24th of November, 1857, an order was made for winding up the company.

* *Mr. Edward James, Mr. Selwyn and Mr. Aston*, for * 322 the appeal motion. — If there is even a doubt whether discovery will not subject a person to penalties, it will not be compelled. *Nelme v. Newton.* (a) A company purporting to create shares transferable at the mere will of the holder, and which is not formed under the Joint-stock Companies Acts, is illegal. *Josephs v. Pebrer*, (b) *Duvergier v. Fellows*, (c) *Blundell v. Winsor*, (d) *Harrison v. Heathorn*, (e) *Jackson v. Cocker.* (g) The company was in fact a mere bubble company, and illegal at common law; but, if not, it comes within 7 & 8 Vict. c. 110. It is true that it existed before that Act, but it could only exist as a common partnership, and every change in its members made it a fresh partnership, so that the transfer of shares made it fall within the Act, section 26 of which imposes penalties for such proceedings as took place here. Moreover, the prospectus, which is in fact the deed of settlement of the company, contains a scheme for rigging the market. The reason therefore given by the witness is sufficient. There is reason to believe that he might be liable to indictment for trafficking in the shares of this illegal company.

[The Lord Justice TURNER referred to *Green v. Weaver.* (h)]

That case only shows that a man may contract himself out of his right to decline answering. It is not necessary to show that answering would have an obvious tendency to criminate. *Short v. Mercier.* (i) But the Court will not weigh the reason, for a witness is not bound to give any reason at all why he supposes that answering will tend to criminate him. *Fisher v.*

(a) 2 Y. & J. 186.

(b) 3 B. & C. 639.

(c) 5 Bing. 248.

(d) 8 Sim. 601.

(e) 6 M. & G. 81.

(g) 4 Beav. 59.

(h) 1 Sim. 404.

(i) 2 De G. & Sm. 635.

* 323 *Ronalds. (a)* The company being * illegal, no one representing it can call upon a stranger to answer. *Harvey v. Collett. (b)*

Mr. Roundell Palmer and *Mr. Roxburgh* appeared for the official manager, but were not called upon.

THE LORD JUSTICE KNIGHT BRUCE. — In my judgment there is no pretence for this motion. The case might possibly have been in a position materially different if it had been affected by the statute 7 & 8 Vict. c. 110, § 26; but in my opinion it is not so affected. This company was constituted in 1835, and the circumstance that before and since the passing of that Act shares have been transferred so as to change the individuals composing the company, cannot, I think, have the effect of bringing the company within the section. The question is, whether this gentleman, having given a reason, has given one which can be accepted, for refusing to answer the interrogatories put to him. [His Lordship here read the questions and answers.] The refusal of the witness to answer the last question must be taken in connection with the reason that he had previously given for not answering, which was only that as he was advised the company was illegal. His being advised that it was illegal amounts to nothing; if he could have shown that it was illegal he would have advanced a step. But independently of the presumption of its legality, which arises from the fact of the order for winding it up having been in force for two years, I must say that I have not heard any evidence tending to show that it is illegal. I do not express any opinion either of agreement or disagreement as to the *dictum* of Mr. Justice MAULE respecting the right of a witness to

* 324 * refuse to answer a question on the ground that it may tend to make him liable to criminal proceedings, without giving any reason why it should have such an effect. Here the witness has given as his sole reason what substantially seems to me no reason at all. The motion will be refused with costs.

THE LORD JUSTICE TURNER. — I entirely agree, and have nothing to add.

(a) 12 C. B. 762.

(b) 15 Sim. 332.

Mr. Southgate, for the creditors' representative, who had not been served, asked for his costs, submitting that it was his duty to attend the proceedings.

Their Lordships directed that the creditors' representative should have the costs of his appearance out of the estate.

* BRISTOW v. WHITMORE.

* 325

1859. June 3, 4. Before the Lord Chancellor Lord CHELMSFORD.

A master of a ship has not, according to English law, any lien on the freight for money expended in fulfilling a charter-party,¹ and it makes no difference that the particular expenditure was expressly required by the terms of the contract, and that the master had no means of meeting it, nor that the charter-party is under seal and made by the master himself, so that the freight could only be recovered in his name.²

THIS was an appeal of defendants from the decision of Vice-Chancellor WOOD, declaring that the plaintiff, who was the master of a ship, was entitled as against all persons interested in the freight to be indemnified out of it in respect of his expenditure and liability incurred in providing for the vessel's fittings and provisions, in the fulfilment of the obligations specifically imposed on the owners of the ship as to the fittings and provisions of the ship by the terms of certain charter-parties, which were entered

¹ See *Bristow v. Whitmore*, 9 H. L. Cas. 391.

² This decision of Lord CHELMSFORD was reversed in the House of Lords (*Bristow v. Whitmore*, 9 H. L. Cas. 391), on the principle that the master having made a special contract, in itself *ultra vires*, in order to fulfil which he incurred special expenses, the case became one of ordinary principal and agent, and the owner having adopted the benefit of the contract, must in equity also bear its burdens. Lord KINGSDOWN intimated an opinion that even if the contract of the master was within his ordinary authority by virtue of his employment, that circumstance would make no difference. 9 H. L. Cas. 419. The House of Lords held (diss. Lord WENSLEYDALE and Lord CHELMSFORD) that in equity the master was first entitled out of the freight earned under the charter-parties to be repaid the sums advanced, and to be indemnified against the bills, and that the owner (or his mortgagee) was only entitled to the net freight after deducting these charges.

into by the master abroad, and one of which was under seal. The grounds of the decision were, that the charter-parties could not have been obtained without these stipulations, and that the master could not perform them without incurring the expenses and liability in question; that consequently the parties claiming the benefit of the charter-parties could only obtain it upon the terms of discharging the obligations to which they were subject, and that as regards the last-mentioned charter-party, this circumstance, either with or without the additional one, that under the charter-party the legal title to sue was in the master only, withdrew the case from the authority of those deciding that by the English law the Master has no lien for his outlay in respect of repairs, wages, or stores on the voyage.

The charter-party which was under seal was dated the 19th of April, 1856, and made between the plaintiff, who was described as commander of the vessel, of the one part, and the agent of the commissioners of the admiralty at the Mauritius, of the other part, and by it the plaintiff let and the admiralty agent hired the vessel, which was called the Kenilworth, to convey troops from the Mauritius to Gravesend. And the plaintiff thereby agreed to furnish such provisions, and to put up at the expense of the ship such fittings as would be required for the use of the troops, subject to the approval of the deputy quarter-master general.

The other charter-party was made on the homeward voyage at the Cape of Good Hope, and was dated the 27th of May, 1856. It was made between the agent of the admiralty at the Cape, of the one part, and the plaintiff, described as the master of the ship, of the other part. This was also a contract for the conveyance of troops, and to supply them with provisions on the voyage, and also to fit up the vessel according to a specification and report annexed to the charter-party, at the expense of the vessel.

The plaintiff had expended, in complying with the requirements of one charter-party 810*l.* 12*s.* 9*d.*, and with those of the other 715*l.*, and had defrayed these expenses partly by his own moneys, and partly by bills drawn by him on the ship-owner.

On the ship's arrival at Gravesend, Messrs. Robinson and Fleming, two of the defendants, who were transferees of a mort-

gage made in April, 1855, on the vessel, took possession of her, and the owner was adjudicated bankrupt.

Conflicting claims were made to the freight by the master in respect of his outlay, and by the mortgagees, who claimed to receive the freight without deduction on this account, and the admiralty refused to pay either party till the dispute was settled, and ultimately paid the money into Court in the suit.

* The case is reported on the hearing before the Vice- * 327 Chancellor in Mr. Johnson's Reports, (a) where, and in the Lord Chancellor's judgment, (b) the facts are fully stated.

Mr. Rolt and *Mr. Baggallay*, for the plaintiff, in support of the decree. — The circumstances of this case are altogether different from those of *Hussey v. Christie*, (c) and the other cases in which the master has been held to have no lien. And in *Smith v. Plummer*, (d) which was relied upon below on the part of the appellants, both Lord ELLENBOROUGH, and Mr. Justice ABBOTT left open the question of a lien for the current expenses of the vessel. Here the charterers required, before they would enter into the charter-party, that the ship should be fitted up and victualled in a proper manner to carry troops. It is not disputed that the master had authority to engage the vessel for that purpose, or that this was the most advantageous and profitable employment for her which he could procure. The freight of the ship is in fact the money agreed to be paid, less the outlay for refitting and victualling her. As regards one of the charter-parties, neither the mortgagees nor the assignees of the owner can obtain the freight by suing in their own names, the instrument being under seal, and in the name of the master. The money must be recovered by him or in his name, and he may of course deduct his expenses.

They also referred to *Green v. Briggs*. (e)

Mr. Amphlett and *Mr. E. Macnaghten*, for the appellants, the mortgagees. — * The decision under appeal is the * 328 first exception to an uniform series of decisions, which have settled that the master has no lien on the ship or on her freight

(a) Page 102.

(d) 1 B. & Ald. 575.

(b) *Post*, 329.

(e) 6 Hare, 395.

(c) 9 East, 426.

for the expenses of the voyage. When the mortgagee of a ship takes possession of her, he is entitled to the gross freight without any deductions. *Dean v. M'Ghie*, (a) *Kerswill v. Bishop*, (b) *Cato v. Irving*. (c) It is like the case of a mortgagee of land, who, on taking possession, is entitled to the growing crops, without any deduction for the costs of cultivation. There is no lien in equity, unless there is any at law, and that there is none at law is decided by *Smith v. Plummer*, (d) *Stainbank v. Fenning*, (e) *Stainbank v. Shepard*. (g) It is said that Lord ELLENBOROUGH left open the question, but there is obviously some mistake in the report. It has been argued that the rule may operate unjustly, but the answer that has always been given to this argument is, that the rule is well established and known, and that any master advancing money does so with the full knowledge that he has no lien on the freight. In cases of necessity he can borrow on a bottomry bond, and this is the proper and usual course to adopt. If the rule was that the master had a lien, the owner could not deal with the ship or the freight until the accounts with the master were settled, which would lead to the greatest inconvenience. The Merchant Shipping Act has altered the law as to this in one respect, for by the 191st section of that Act the master has now a lien for wages. But in other respects the old law remains, which excludes any lien for advances made by the master. The distinction on which the Vice-Chancellor proceeded, between expenses incurred in fulfilling express stipulations in the charter-party and others required for the general purposes of the ship, is, we submit, without foundation. Both descriptions of expenses are equally requisite to enable the ship to earn the freight, and the circumstance of one being expressly, and the other impliedly, contracted for can make no difference in principle. Nor is it material that one of the charter-parties is under seal. It is true that the mortgagees must sue in the name of the master. But they are, as a matter of course, entitled so to sue without any terms being imposed upon them, beyond those of indemnifying the master against any costs or damages in the action. He became their agent the moment they took possession.

(a) 4 Bing. 45.

(b) 2 Cr. & Jerv. 529.

(c) 5 De G. & S. 210.

(d) 1 B. & Ald. 575.

(e) 11 C. B. 51.

(g) 13 C. B. 418.

They also referred to *Gibson v. Ingo*, (a) *Atkinson v. Cotesworth*, (b) *Higgins v. Senior*, (c) *Beckham v. Drake* (d) *Case v. Davison*, (e) *Morrison v. Parsons*, (g) *Lindsay v. Gibbs*, (h) *Rooke v. Kensington*, (i) *Lister v. Payn*, (k) *Gladstone v. Birley*. (l)

Mr. Rolt, in reply.

Judgment reserved.

The following written judgment was delivered out to the parties by Lord CHELMSFORD, after he had resigned the great seal:—

The question in this case is, whether the master of a vessel has any equitable right to indemnity out of the freight in respect of advances made, and bills of exchange drawn by him, for the purpose of enabling him to adapt the vessel to the specific performance of two charter-parties, which he entered into with the commissioners * of the admiralty at the Mauritius * 330 and Cape of Good Hope, the former being under seal, the latter not under seal.

The bill was filed, praying that it might be declared that the plaintiff is entitled to be repaid out of the moneys due from the commissioners of the admiralty the sum of 64*l.* 17*s.* 2*d.* and 27*l.* 7*s.* 9*d.*, and also to be indemnified out of the said moneys against the amount of the several bills, and against all claims and demands whatsoever which have been or may be made upon him by reason or on account of such bills, or any of them, and against all costs and expenses which have been or may be incurred or sustained by him in relation thereto.

Upon the case coming on to be heard before Vice-Chancellor WOOD, his Honor was of opinion that he had no jurisdiction under the 50th section of the Act of 15 & 16 Vict. c. 86, or

(a) 6 Hare, 112.

(b) 3 B. & C. 647.

(c) 8 M. & W. 834.

(d) 9 M. & W. 79.

(e) 5 M. & Sel. 79.

(g) 2 Taunt. 407.

(h) 22 Beav. 522.

(i) 2 K. & J. 753.

(k) 11 Sim. 348.

(l) 2 Meriv. 401.

otherwise to make a declaration of right, unless it were one upon which the Court could act by granting consequential relief, and he decided that he had no jurisdiction to entertain the suit, unless the commissioners of the admiralty would consent to pay the fund into Court. This was afterwards done, and the fund being in Court, the Vice-Chancellor pronounced a decree, by which he declared that the plaintiff was entitled to be indemnified out of the freight, in respect of all payments and liabilities made and incurred by the plaintiff in fulfilment of the obligations specifically imposed by the said contracts respectively on the owners of the vessels, as to the fittings and provisions of the said ship, and also in respect of the costs of the suit. Against this decree the petition of appeal was presented.

* 331 * The vessel in question, the *Kenilworth*, of which John Beckwith Towse was sole owner, was mortgaged by him on the 14th of April, 1855, together with her freight, to Robert Jones Brown for 3500*l.*, and the defendants William Robinson and John Fleming became the assignees of this mortgage on the 29th of August, 1856.

The *Kenilworth* being at the Mauritius, she was chartered by the plaintiff, the master, to the government, for the conveyance of troops to England, and a charter-party, under seal, was entered into on the 19th of April, 1856, between the plaintiff, described as commander of the vessel, of the one part, and Commissary-General Laidley, the senior commissariat officer at the Mauritius, on behalf of the commissioners for executing the office of lord high admiral of the United Kingdom of Great Britain and Ireland, for and on behalf of her Majesty, her heirs and successors, of the other part; by which the plaintiff let and the admiralty agent hired and took to freight the said ship, for the purpose of conveying such officers, non-commissioned officers and soldiers, women, children, and other persons, with their baggage and stores, as might be ordered to embark by the major-general commanding the Queen's forces in the Mauritius, from Port-Louis to Gravesend. The plaintiff agreed to provide and issue to the troops and other persons embarked, during the time they were on board, good, sweet, and wholesome provisions, to be approved of by a board of officers appointed to inspect the same. And he also agreed to put up at the expense of the ship such fittings,

berths, tables, forms, &c., as might be required for the use of the men, women, and children, the whole to be subject to the approval of the deputy quarter-master general.

* To enable the plaintiff to comply with the terms of * 332 the charter-party, large quantities of provisions and other necessaries were purchased and put on board the vessel, and other expenses were incurred in preparing her to receive the troops on board. The aggregate expense incurred for these purposes was 810*l.* 12*s.* 9*d.*, of which the sum of 64*l.* 17*s.* 2*d.* was paid by the plaintiff out of his own money; and to meet the residue, amounting to 745*l.* 15*s.* 7*d.*, two bills were drawn by him upon the owner Towse in favour of the persons at the Mauritius who had made him the necessary advances.

The vessel, on her voyage to Gravesend, touched at the Cape of Good Hope, and there, on the 27th of May, 1856, another charter-party was entered into, not under seal, between the plaintiff and Mr. John M'Gregor, acting naval storekeeper and agent victualler at the Cape of Good Hope, for the commissioners of the admiralty for the conveyance of other troops to England, by which it was agreed that the vessel should be provided and fitted up, according to an inspection report annexed, as to accommodation, ventilation, fumigation and other requisites at the expense of the vessel, that the officers should be provided with a good and sufficient mess, according to certain specified particulars, and that the men, women, and children should be victualled by the master of the vessel, in conformity with a specified scale and directions signed by the parties, the provisions and water to be in sufficient quantity for ninety-eight days, and to be subject to the inspection of a board of officers previous to their embarkation.

In supplying the provisions as required by this charter-party, an expense of 700*l.* 15*s.* 1*d.* was incurred, of which the sum of 27*l.* 7*s.* 9*d.* was paid by the plaintiff * out of his * 333 own money, and for the residue, amounting to 673*l.* 7*s.* 4*d.*, a bill was drawn by plaintiff upon Towse the owner, in favour of the persons at the Cape who had made the advances.

On the arrival of the vessel in the Thames, and before the cargo was discharged, she was seized by the defendants Robinson and Fleming under their mortgage. On the 29th October, 1856, Towse the owner was adjudicated bankrupt. The bills drawn

upon him by the plaintiff were dishonoured, and the plaintiff was threatened with actions by the holders. The admiralty having refused to pay the freight until the rights of the parties should be determined, the plaintiff filed his bill, which raises the question which I have before stated.

In determining what are the equitable rights of the parties (if any) under the circumstances, it will be necessary first to ascertain how the matter would have stood at law. No question has been raised as to the authority of the master to bind the owner of the charter-parties upon the ground that they are contracts not relating to the usual employment of the vessel. It must, therefore, be assumed that the master had full authority to enter into them.

It has been long settled that the master of a vessel has no lien upon the ship or the freight for money which he may have expended, or liabilities which he may have incurred for the repairs of the ship, or for stores supplied to her, or for wages which he has paid, or for other disbursements which he has made during the voyage. This was determined, as to the ship, by the case of *Hussey v. Christie* (a) and others, and as to the * 334 freight * by the case of *Smith v. Plummer* (b). The law upon this subject having been established by these and other decisions, it appears to be a superfluous task to inquire into the reasons which have occasioned the difference in the rule which prevails in this country and that of most other foreign countries in this respect. It may have been partly owing to the technical nature of our law of lien which requires that there should be possession of the property upon which it attaches to enable a party to enforce it. But the master is only the servant of the owner, and therefore cannot, as against him, have any possession of the ship or the freight. He may, on behalf of the owner, detain the goods of a consignee, i.e. assert a lien upon them, till the freight is paid, but this is a very different thing from converting a possession of ship or freight, in his character of agent for the owner, into an independent possession of his own to enforce his rights against the owner. Our law may also have proceeded upon a view of the inconvenience which would result from allowing the master's lien, as the owner would be deprived of his ship and his freight until he had first settled all accounts

(a) 9 East, 426.

(b) 1 B. & Ald. 575.

with the master. But that which most recommends the general rule is the power which the master has of pledging the credit of the owner, or of hypothecating the vessel for necessary repairs and disbursements, or, according to the case of *Stainbank and another v. Shepard*, (a) of doing both, provided the personal credit of the owner is pledged, and the hypothecation of the ship is made by separate and distinct instruments. If, therefore, the master chooses to make advances himself, and he finds that he has no lien for them, he has no right to accuse the law, because, as Mr. Justice BAYLEY says in *Smith v. Plummer*, "it was in his power, in order to protect himself against any loss * from nonpayment of wages, or for advances, &c., made * 335 by him abroad, to make a specific bargain with the owners, and require security for the performance." And a similar remark is made by Lord ELLENBOROUGH in *Hussey v. Christie*, "If (he says) the necessary repairs be done abroad, the master may hypothecate the ship for them, and it is his own fault if he subject himself to any personal liability, which he may renounce.

Cases may easily be suggested in which it would be extremely hard upon the master that he should not have the power of satisfying himself for advances which he has made by means of a lien, as where his personal expenditure has been bestowed upon matters of absolute necessity, from an utter inability to obtain money either by pledging his owner's credit or by hypothecation. But the convenience of the general rule, which excludes a lien, by the exercise of which the master might detain a vessel or withhold the freight until a general settlement of his accounts with the owner, more than compensates for an inconvenience or hardship which it may produce in a few cases, especially, as is observed by Mr. Justice BAYLEY in *Smith v. Plummer*: (b) "If any hardship arise to the master from this, it is owing to his having made an imperfect bargain with his owners."

It was contended on the part of the plaintiff that in the case of *Smith v. Plummer*, (b) the question of a lien for the current expenses of the vessel was left open both by Lord ELLENBOROUGH and Mr. Justice ABBOTT. With respect to the former, I do not think that the mistake imputed to the report by *Mr. Amphlett* sufficiently appears, although, if the judgment be read as it stands, his Lordship seems to have omitted all notice of the 150l.

(a) 13 C. B. 418.

(b) 1 B. & Ald. 575.

* 336 * which was claimed as a distinct deduction by the defendants as a part payment of the freight. He had already stated his opinion that for the advances made abroad the master had no lien. But it had been observed in argument that it was not even shown that the money advanced was necessary for the ship's disbursements, and for any thing that appeared it might have been advanced to the master to pay his own wages. This argument Lord ELLENBOROUGH adopts, and, after observing that there was no lien either upon the ship or the freight, he adds, "and here there is the additional circumstance that it is not proved that these advances abroad were made for the current expenses of the ship." As if he had said, "I have already stated that there is no lien generally, but in this case the probability of lien is excluded by the absence of proof that the advances were for current expenses." Mr. Justice ABBOTT, in speaking of the current expenses, is dealing with the advance of 150*l.* to the master, which the defendants the consignees claimed as a part payment of the freight, as it was made to enable him to defray the current expenses of the vessel. This was wholly distinct from the question of the lien by the master, of which he had previously disposed. It is difficult to consider the question of a lien for the current expenses of a vessel to be still undetermined when it has been decided that the master has no lien for disbursements for the vessel, unless some distinction can be suggested between "current expenses" and "disbursements," which I am unable to perceive.

I asked, during the argument, whether there was any case to be found in which, upon the general law on the subject, a master had been allowed to have a lien upon ship or freight for an outlay of any description made by him for the purposes of the voyage, and I received for answer that there was none.

* 337 * But it was contended for the plaintiff that there was a peculiarity in this case, which distinguished it from others which were mentioned in the course of the argument. That the money laid out on the liability incurred by the master, was only useful for the earning of the particular freight, that it was a necessary expenditure according to the stipulations of the charter-parties to enable the freight to be earned, and might be therefore regarded as an outlay upon the freight itself. Some doubt was expressed in the course of the argument whether the master could

have hypothecated the vessel, in order to obtain the means of providing the fittings and the other requisites for the particular voyage. But if the engagement was not foreign to the usual employment of the vessel (which appears to have been taken for granted), and the master had therefore authority to bind his owner by the charter-parties, I see no reason for thinking that he might not hypothecate the vessel to provide for things incidental and necessary to the due performance of the contract, just as he might to enable him to do the necessary repairs, to render the vessel seaworthy for the voyage, without which the contract would be equally incapable of performance.

I have endeavoured in vain to comprehend the distinction pressed upon me between things which are necessary to adapt a vessel to the particular voyage for which she is engaged, and those which are not peculiar to any one voyage, but which are common to all, such as the repairs of the vessel and the provisioning of the crew. All alike are essential to the due performance of the contract. All are equally an expenditure to enable the freight to be earned. Without them, in all cases, the particular voyage could not be performed; and as the freight cannot become due until the termination of the voyage, they may be similarly regarded as an outlay upon * the freight. I * 338 think, therefore, that there is nothing particular to this case to remove it from the reach of the authorities which have refused a lien to the master of a vessel for advances made by him for the purposes of the voyage.

It is contended, however, that there must at least be a difference in this case between the two charter-parties as to the right of the master. That although in the one not under seal the owner might have sued in his own name according to the cases of *Higgins v. Senior*, (a) and *Beckham v. Drake*, (b)¹ yet upon the contract under seal, an action could only be brought in the name of the master. It is quite true that in either case the master might have sued in his own name if the owner had not interposed; and that with respect to the charter-party under seal, the owner would have been entitled to have brought his action in the name of the master, upon indemnifying him against the costs. If the master had brought the action and had recovered and received

(a) 8 M. & W. 834.

(b) 9 M. & W. 79.

¹ See Chitty Contr. (10th Am. ed.), 242, 243, in note.

the freight, he might have paid himself his advances out of it. For the owner could have obtained the money from him at law only by an action for money had and received, in which the master might have set off the money he had advanced, but he would have obtained no indemnity against his liability on the bills.

I do not see what equitable rights the plaintiff has beyond those which he would have had at law. The mortgagees would clearly have been entitled to receive the whole of the freight without being bound to pay the master for the advances which he made, for which the owner alone is personally liable, and of course they could not have been compelled to indemnify the plaintiff

* 339 from * his liability on the bills. I do not think that the mere payment of the freight into Court, under the circumstances, by the commissioners of the admiralty, can give the Court a right to deal with it as against the defendants, the mortgagees. They are not making any claim to it, or applying for any relief, but are merely defending themselves in a suit which, when originally brought, the Court had no jurisdiction to entertain. The mortgagees are, in my opinion, entitled to the whole of the freight without any deduction. They are willing, as I understand, to pay to the plaintiff the money which he has actually disbursed, and they ask for no costs against him in the suit.

I think I am bound to declare that the defendants, Robinson and Fleming, are entitled to the whole sum of 3155*l.* 18*s.* 6*d.* standing in the bank to the credit of this cause, and to order it to be paid out to them accordingly.

Allow the appeal — dismiss the bill without costs.

Declare Robinson and Fleming entitled to the 3155*l.* 18*s.* 6*d.*, and decree it to be paid.

* In the Matter of LOVELACE'S SETTLEMENT, and * 340
of 10 & 11 VICT. c. 96.

1859. June 3, 4, 14. Before the LORDS JUSTICES.

The 4th section of the Succession Duty Act does not restrict the operation of the duty as regards appointments to cases where the powers are created by wills taking effect, or by settlements made, after the commencement of the Act.

Personal property appointed under a general power, and not coming within the 4th section of the Act, ought not to be treated as the property of the donee, so as to be, in the case of the donee being domiciled abroad, exempt from succession duty.¹

The Act applies to a succession under a British settlement to British property vested in British trustees, and falling under the jurisdiction of a British Court, although the persons entitled are aliens domiciled abroad.

THIS was an appeal from an order made by Vice-Chancellor Wood, declaring that succession duty was not payable upon a certain fund of 10,000*l.*, part of a larger sum which had been paid into Court under the Trustees Relief Act.

By a settlement dated the 21st of April, 1817, and made upon the marriage of Charles Lovelace and the Honourable Maria Vanneck, the latter assigned personal property to a considerable amount, to which she was entitled, to trustees upon certain trusts, during the lives of her and her husband and the life of the survivor; and in the event which happened of there being no issue of the marriage living to attain a vested interest, upon such trusts as she should appoint by deed or will, and in default of appointment for her next of kin.

Mr. and Mrs. Lovelace, soon after the marriage, went to reside in France, where they became domiciled and remained domiciled till their respective deaths.

Mr. Lovelace died in March, 1852, and in April, 1852, Mrs. Lovelace duly exercised her power of appointment by will, whereby she bequeathed 10,000*l.* to be equally divided between two persons, natives of * France, and residing and domi- * 341
ciled there. She died at Bordeaux on the 21st of April, 1856.

¹ See *Re Wallop's Trusts*, 1 De G., J. & S. 656, 670.

The Succession Duty Act (16 & 17 Vict. c. 51) came into operation on the 19th of May, 1853.

The appointees presented a petition for the payment out of Court of the 10,000*l.*, and, upon the Crown claiming succession duty, the Vice-Chancellor decided that duty was not payable. From that decision the Crown appealed.

The following are the sections of the Succession Duty Act referred to in the argument and judgment.

Sect. 2. Every past or future disposition of property by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property or the income thereof upon the death of any person dying after the time appointed for the commencement of this Act, to any other person, in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a "succession;" and the term "successor" shall denote the person so entitled, and the term "predecessor" shall denote the settlor, disponent, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived.

Sect. 4. Where any person shall have a general power of appointment under any disposition of property, taking effect upon the death of any person dying after the time
* 342 appointed for the commencement of this Act, * over property, he shall, in the event of his making any appointment thereunder, be deemed to be entitled, at the time of his exercising such power, to the property or interest thereby appointed as a succession derived from the donor of the power; and where any person shall have a limited power of appointment under a disposition taking effect, upon any such death, over property, any person taking any property by the exercise of such power shall be deemed to take the same as a succession derived from the person creating the power as predecessor.

Sect. 12. Where any person shall take a succession under a disposition made by himself, then if at the date of such disposi-

tion he shall have been entitled to the property comprised in the succession expectantly on the death of any person dying after the time appointed for the commencement of this Act, and such person shall have died during the continuance of such disposition, he shall be chargeable with duty on his succession at the same rate as he would have been chargeable with if no such disposition had been made; but a successor shall not in any other case be chargeable with duty upon a succession taken under a disposition made by himself: and no person shall be chargeable with duty upon the extinction or determination of any charge, estate, or interest created by himself, unless at the date of the creation thereof he shall have been entitled to the property subjected thereto expectantly on the death of some person dying after the time appointed for the commencement of this Act.

The Solicitor-General (Sir H. M. CAIRNS) and *Mr. Hanson*, for the Crown. — The words of the 2d section by themselves, and without looking to other sections, are large enough to embrace this case; so far the Vice-Chancellor is with us. The Vice-Chancellor thought that powers of appointment * and * 343 successions under them are affected by the 4th section only, and moreover that the operation of that section was restricted to cases which take place under dispositions of property taking effect on the death of some person dying after the time appointed for the commencement of the Act; in other words, either to wills taking effect or settlements made after the Act came into operation: but we say that the sections following the 2d (viz. sections 3–8) are by way of increase or aggravation of the tax, inserted for the purpose of including cases about which there might be some doubt as to their being embraced by the 2d section. The 4th section, the Vice-Chancellor thought, took this case out of the 2d section; but we contend that the 4th section does not apply, and consequently that the 2d section remains applicable. The first part of the 4th section recognizes, as the Legacy Duty Acts did, the difference between “power” and “property,” and says that, if the donee of a general power exercises it, he thereby makes it his property, and must pay duty upon it just as if it had been directly given to him *quæ* property. Double duty is payable, once by the donee and once by the appointee, if the donee exercises the power; single duty only if

he does not. This part of the section applies not to the duty to be paid by the appointee, under a general power, but to that of the donee; the case of appointees is left to the 2d section; the 4th supplies an addition to the 2d to meet the case of donees of a power. The word "disposition" in the 4th section does not mean an instrument, as a deed or will, for a deed does not take effect on a death; but it means "limitation of property taking effect, &c." The 4th section does not apply to this case at all: first, because Mrs. Lovelace executed the power before the Succession Duty Act came into operation, and the words of the section are clearly future; secondly, because the section * 344 contemplating that the power must be exercised * upon a death, that death must be the death of some other person than the person executing the power; and thirdly, because even if Mrs. Lovelace had executed the power after the commencement of the Act, and even if the 4th section did apply, she is her own predecessor under the 12th section, and no duty is payable. The 4th section not applying, the 2d section does apply, and duty is chargeable.

They referred to *Wilcox v. Smith*, (a) *The Attorney-General v. Lord Middleton*, (b) *Platt v. Routh*, (c) Trevor on Taxes on Succession; (d) 36 Geo. 3, c. 52, §§ 7, 18.

Mr. Willcock, *Mr. J. H. Palmer*, and *Mr. R. Turner*, for the respondents. — The case is governed, not by the 2d section as the appellants contend, but by the 4th, if by any. Although the 2d section might extend to the case, if unexplained by other parts of the Act, a reference to other parts show that the general expressions in section 2 do not apply to appointments under powers. If they did, the two sections would contradict one another, as the 2d would make the appointee successor to the donor in the case of an appointment under a general power, while the 4th would make the donee the successor to the donor. The 12th section points to the same conclusion, viz., that successions under appointments are dealt with exclusively by the 4th section. But as that section only applies to powers arising under dispositions taking effect upon a death after the commencement

(a) 4 Drew. 40.

(c) 3 Beav. 257; 10 Cl. & Fin. 257.

(b) 8 H. & N. 125.

(d) Pages 170, 250.

of the Act, it does not apply to this case. If however, it should be held to * apply, still under its provisions and * 345 independently of them the general power must be treated as substantially Mrs. Lovelace's property. Now Mrs. Lovelace was domiciled in France, and therefore no duty is payable on the property appointed by her, any more than it would be under the Legacy Duty Act, if she had bequeathed property in every sense her own. *Jefferies v. Boosey*, (a) *Thomson v. The Advocate-General*. (b) Moreover, the appointees are domiciled abroad, and the Act cannot have been intended to apply to such cases, for how could the duty be recovered from foreigners under the 44th section, or penalties enforced under the 46th? How could the person accountable appeal under the 50th?

[THE LORD JUSTICE TURNER. — The trustees of the settlement are here.]

[THE LORD JUSTICE KNIGHT BRUCE. — The money is in the English funds.]

The Solicitor-General in reply.

Judgment reserved.

June 14.

THE LORD JUSTICE KNIGHT BRUCE. — On the occasion of the marriage of Miss Vanneck with Mr. Lovelace in the year 1817, a settlement was made under which the question in the present case arises. It was dated in that year. By the terms of it Mrs. Lovelace (as there was no issue of the marriage, and she survived her husband, who died in the year 1852) became tenant for life of the property — personalty altogether — which was settled by it, with an absolute power of appointment over the capital, exercisable either by deed or by will. In default of execution of the power, the property, * after her death, * 346 was not to belong to herself or her estate, but was to devolve on her next of kin.

She executed the power by a will made in the year 1852, after her husband's death. The will was a full and valid appointment,

(a) 4 H. L. Cas. 815.

(b) 12 Cl. & F. 1.

perfectly effectual. She died after the year 1853, without having revoked or altered it.

The respondents in the present case are some of the appointees, and, being strangers in blood to Mrs. Lovelace, nor connected with her by marriage, a duty of ten per cent on the amount appointed, a considerable amount, is claimed by the Crown from them by force of the Legacy Duty Acts, prior to the statute 16 & 17 Vict. c. 51, and of that statute, or at least by force of the statute 16 & 17 Vict. c. 51.

The settlement was an English marriage settlement, made in England on the marriage of two English persons. It affected English personalty only. But—the lady's English domicile of origin having I think, before the year 1852, been changed for a foreign, I believe for a French domicile, which newly acquired domicile she retained, probably or certainly, throughout that year and thenceforth to her death—I doubted at one time whether that change of domicile might not affect the controversy which, as I have said, is as to the alleged title of the Crown—if not under the Legacy Duty Acts preceding the statute 16 & 17 Vict. c. 51, at least under that statute—to a duty of ten per cent on the amount of the settled personalty appointed by the lady to strangers in blood not connected with her by marriage, under a general power given or reserved to her by the settlement. The change of domicile however, now seems to me not material.

The appointed property would, if she had not exercised
* 347 * her power of appointment, have not been part of her estate. It would, in that event, have devolved on her death upon her next of kin as persons designated by the settlement.

The Crown appears to me to have clearly a right to the duty claimed, unless excluded by the 4th section of the statute of the 16th and 17th of the Queen, c. 51, which section (I say so with the utmost deference to the learned Judge who is stated to have thought otherwise) does not, I think, bear on the controversy. The husband and wife were the donors, or one of them was the donor, of the power which the wife duly exercised. But I do not collect from the 4th section any intention of conferring an exemption from duty in consequence of the execution of a power in such circumstances as existed in the present instance. I also think the 12th section of the Act, and the fact that the respon-

dents, the appointees, are aliens, immaterial for every present purpose, and my opinion is in favour of the Crown claiming, as the Crown does, only a single duty; that is to say, no duty in respect of any acquisition or supposed acquisition of property by Mrs. Lovelace, no duty as against that lady or her estate, but only duty in respect of her execution of the power against those, or some of those, in whose favour she executed it.

THE LORD JUSTICE TURNER. — This is a question upon the the Succession Duty Act, 1853. The late Mrs. Lovelace, under her marriage settlement, dated long before the passing of the Act, was tenant for life in remainder after the death of her husband, who died before the Act, possessed of considerable personal estate in this country, originally vested in trustees resident here, but afterwards paid into Court under the * Trustees Relief Act. She had a general power of * 348 appointment over the property by deed or will, which power, from the failure of intermediate limitations, followed immediately upon her life-estate. After her marriage she became domiciled abroad, and whilst so domiciled she exercised her power of appointment by a will, dated before the passing the Act, in favour of persons who appear also to be domiciled abroad. She died after the time appointed for the commencement of the Act, and the question is whether succession duty is payable by her appointees. The Vice-Chancellor, Sir W. P. Wood, has been of opinion that it is not, and the appeal before us, presented by the Attorney-General, brings his Honor's judgment under review.

Having considered the case, both during the argument and since, I find myself compelled to dissent from the conclusion at which his Honor has arrived. The case depends, as it seems to me, upon the 2d and 4th sections of the Act, the point raised upon the 12th section not appearing to me to arise.

By the 2d section it is enacted: [His Lordship read it.] Taking this section by itself there cannot, I think, be any reasonable doubt that appointees under general powers of appointment were meant to be included, and are included, within it. It extends to all persons who are, by reason of any past or future disposition of property, entitled either originally or by substitutive limitation, and it cannot I think be said that appointees under

a general power are not entitled, by reason of the disposition which created the power. They derive their title indeed through the instrumentality of the donee of the power, but they could have no title if the disposition creating the power had not existed. I have had less difficulty upon this point, as

the Vice-Chancellor has come to the same conclusion * 349 * upon it. But then the Vice-Chancellor has held that taking the 4th section in connection with the 2d, it sufficiently appears that powers of appointment and successions under them were intended to be dealt with by the 4th section only, and that appointees under general powers and—as I presume in his Honor's judgment—appointees under limited powers, also, are not therefore affected by the 2d section. And he has further held that the 4th section has restricted the operation of the succession duty with reference to the execution of powers of appointment to cases which take place under dispositions of property taking effect on the death of some person dying after the time appointed for the commencement of the Act; in other words, either to wills taking effect, or to settlements made after the commencement of the Act; and upon these grounds he has determined that no succession duty is payable in the case before us.

With the most unfeigned respect for the judgment of the Vice-Chancellor, from whose opinion I never differ without some considerable degree of apprehension, I cannot agree with him in either of these conclusions. The 4th section is in these terms: [His Lordship read it.] This section provides therefore that where there is a general power of appointment under a disposition taking effect on the death of a person dying after the time appointed for the commencement of the Act (whatever may be the meaning of those words—a point to which I shall presently advert), the donee of the power, if he exercises it, shall be deemed to be entitled to the property appointed as a succession derived from the donor. But it does not seem to me to follow that, because in the particular case pointed out by the section the donee of the power is to be the successor to the donor, therefore, in other cases not falling within the section, the appointee is not to be liable under the 2d section. If, indeed, all the cases * 350 of * appointment under general powers which could fall within the 2d section would also fall within the 4th, there

would, I think, be strong ground for supporting this construction of the Vice-Chancellor. But there certainly may be cases which would fall within the 2d section and would not fall within the 4th. The very case before us is one, as I shall presently have occasion to point out; and if the Vice-Chancellor's construction as to the 4th section, applying only to wills taking effect and to settlements made after the commencement of the Act, be upheld, there would plainly be numberless others. The consequence of this construction of the Act cannot be disregarded. The effect would be that in all cases not falling within the 4th section there would be no duty payable by the appointees if the power was exercised, although the parties entitled in default of appointment would clearly be liable to the duty if the power was not exercised. It is difficult to suppose that this could have been the intention of the legislature.

It may be said that unless the Vice-Chancellor's construction be adopted there would be this difficulty, that the 4th section, in the cases in which it applied, would make the donee of the power the successor, and that the 2d section would, at the same time, place the appointee in that position, and that in cases in which the donee and the appointee would be liable to different rates of duty, it could not be determined which rate of duty would be payable. But this difficulty is, I think, more seeming than substantial; for I apprehend that the express provision of the 4th section, that the donee of the power should be the successor, would, in the cases in which it applied, override the general provision of the 2d section, placing the appointee in that position.

I have gone into this part of the case, as it seems to
* me to bear directly upon the question before us; but this * 351
part of the case is of no great general importance, if considered independently of the question as to the 4th section applying only to wills taking effect, or settlements made after the time appointed for the commencement of the Act; for, independently of that question, there could be but few cases in which duty would not be payable by the donee of the power. I have thought it right, therefore, to consider the case before us with reference to that point also, and I am of opinion that the decision upon it cannot be maintained. The decision is arrived at by treating the words "taking effect upon the death of any person dying after the time appointed for the commencement of this Act," as imme-

diately connected with the words "under any disposition of property," reading the sentence thus: "under any disposition of property taking effect," &c. But the disposition of property here referred to is a disposition under which a person is to have a general power of appointment, and may be therefore a disposition either by deed or will; and the legislature surely cannot have intended to speak of a disposition by deed, which must take effect upon the execution of the deed, as a disposition taking effect upon the death of a person dying before the time appointed for the commencement of the Act. It seems to me therefore that the true construction of this section is to refer the words taking effect, &c., to the power and not to the disposition of the property.

The respondents, not relying wholly upon the judgment of the Vice-Chancellor, argued that this case came within the 4th section, but they failed to convince me of this. I think, looking to the context, the words of the section refer to the power coming into operation, and not to the appointment under it taking effect,

and it is for this reason I think this case does not fall * 352 within the 4th *section, the power having come into operation on the death of Mr. Lovelace (who died before the passing of the Act), and is not affected by the 12th section, as Mrs. Lovelace, not being a successor at all, could not of course be a successor to herself.

The respondents argued that the property in question ought to be regarded as the property of Mrs. Lovelace, and that her domicile having been a foreign domicile, this duty ought not to attach, as it would not have attached upon her property under the Legacy Duty Act; but I can find nothing in the Act which can make this property the property of Mrs. Lovelace, unless the case falls within the 4th section, which I have already stated my opinion that it does not; and if the property cannot be considered as the property of Mrs. Lovelace, the principle on which the cases under the Legacy Duty Act proceeded has not, as it seems to me, any application.

It was further argued for the respondents, that the Act must be regarded as applying to British subjects only, and several of its provisions were referred to as showing that it was so intended, but the provisions referred to go no further than to show that there may be cases in which it may be difficult to recover the

duty, and I cannot go the length of holding that this Act of Parliament, general in its terms, does not apply to the case of a succession under a British settlement to British property, vested in British trustees, and falling under the jurisdiction of a British Court.

Upon the whole, therefore, my opinion is, that the duty in this case is payable. I think the case within the 2d section, not within the 4th section, and not affected by the 12th section.

* PERRY v. SHIPWAY.

* 353

1859. June 6, 7. Before the LORDS JUSTICES.

A chapel was conveyed to trustees appointed by the majority of the men communicants of a congregation of Dissenters for the use of the congregation. According to the ordinances of the society, the pastor was to be first invited to officiate for a certain time by way of probation, and, if approved, was elected by a majority at a church meeting called for that purpose. A pastor was invited to officiate for a year, but before the expiration of that time was displaced by a majority of the trustees, on the ground of alleged misconduct. At a meeting professing to be a church meeting, but not duly called, it was resolved that the probationary pastor should become pastor, and that new locks should be placed on the chapel door. By means of locks affixed in pursuance of this resolution, a minority of the trustees retained possession of the chapel, and the probationary pastor continued to officiate after the probationary period had expired. *Held*, that the majority of the trustees were entitled to an injunction to restrain such use of the chapel.¹

A plaintiff ought not to suffer in costs for having presented his case in every way in which it may reasonably appear necessary to bring it before the Court.

THIS was an appeal from the decision of Vice-Chancellor STUART, upon a motion for a decree, whereby his Honor granted an injunction to restrain a minority of the trustees of a Baptist chapel, and another defendant who claimed to be the minister of the chapel, from disturbing the management of the chapel by the majority of the trustees.

¹ See Perry Trusts, § 413; Cooper v. Gordon, L. R. 8 Eq. 249; 2 Dan. Ch. Pr. (4th Am. ed.) 1653.

The chapel in question was conveyed to the trustees by a deed of the 21st of September, 1808, upon trust for the use and benefit of a society or congregation of Dissenters called Particular or Calvinistic Baptists, maintaining certain doctrines referred to in the deed, and to convey the chapel from time to time as the men communicants of the society in their church meeting duly assembled, or the major part in number so assembled, should from time to time direct.

The society was governed by general ordinances, according to which a pastor was first invited to officiate for a certain time, by way of probation, and, if approved, was then elected pastor by a majority, at a church meeting called for that purpose.

* 354 * Mr. Shipway, one of the defendants, was invited in November, 1857, to preach by way of probation, and continued to officiate till April, 1858, when imputations being made upon his character, a majority of the trustees gave him notice that the chapel would be closed against him, and that he must occupy the pulpit no more. After some resolutions, and counter resolutions of the opponents and supporters of Mr. Shipway, a meeting took place of the latter on July 4, 1858, professing to be a church meeting, but not duly called. At this meeting it was resolved that Mr. Shipway should be the pastor, and that new locks should be placed on the chapel door. A minority of the trustees, with Mr. Shipway, then took possession of the chapel, and placed new locks upon the doors, by means of which the majority of the trustees were deprived of the control of the chapel. Nine of the twelve trustees then instituted the present suit.

The case is reported in the first volume of Mr. Giffard's Reports, (a) where the facts of the case are fully detailed. (b)

Mr. Malins and Mr. J. Turner, for the plaintiffs, the respondents.

Mr. Bacon, Mr. Craig, and Mr. Graham Hastings, for the defendants, the appellants.

THE LORD JUSTICE KNIGHT BRUCE. — For many years before the commencement of this litigation a certain tenement had been

(a) Page 1.

(b) See also the Judgments, *infra*.

vested in trustees, who were changed from time to time; it is now vested in a body of trustees, and the trusts are for religious purposes, namely, for the benefit or use of a class of Christians * described as Particular or Calvinistic Baptists. * 355 The trusts are general in that respect, but practically the temporal affairs of the establishment have been administered by persons selected for that purpose, called deacons, alone or with the trustees of the legal estate for the time being.

In the year 1858, disputes arose amongst those who were interested and concerned in this place of worship and its affairs, one consequence of which is the present suit, including as parties to it, either as plaintiffs or defendants, all the trustees and all the deacons. The object of the suit was not the general management of the affairs of the trust, but only protection against an alleged breach of trust of a particular kind. In substance the suit is instituted on behalf of all persons interested, though it is not so in form; and as it includes all the deacons and all the trustees, and no objection has been taken on the ground of absence of parties, this Court may well deal with the suit as not insufficient, if there are merits to support and justify it.

Complaint is made by some of the persons interested, and is alleged to be without foundation by others of them, that the religious affairs are conducted by a minister against whom serious objections exist; that they are conducted by him without sufficient authority, and that his acts and interference prevent all proper management, and that there is, therefore, a title to the assistance of the Court. There is no doubt that the plaintiffs making this complaint have been interfered with, and there is no doubt, if their allegations are correct, that this is a proper case for the interposition of the Court — at their instance.

It appears that in the course of the year 1857, the * defendant Mr. Shipway had been elected temporarily, * 356 or on probation, to be the minister of this congregation. He accepted the office, and continued to discharge the duties for two or three months, and at Christmas, 1857, he was continued for another year, which would of course expire at or before the end of the year 1858. But the year 1858 was not far advanced when, either without or with sufficient reason, some dissatisfaction arose in the minds of some amongst the trustees, and some amongst the deacons, with Mr. Shipway; and, whether regularly

or irregularly, by those who had the power of enforcing their opinions, Mr. Shipway was displaced from his position. Another minister then officiated in the chapel for several Sundays, until, as it appears, that occurrence took place which has been described as having happened on the 4th of July. At the close of the afternoon service of that day, notice was given of a church meeting (as it was called), to be then and there held; and at that meeting Mr. Shipway was appointed or reappointed, or continued as minister of the congregation. He himself appears to have been present at the meeting and to have taken part in it; in fact, he seems to have entered the chapel, to have ascended into the pulpit, to have gone out, to have come back again, and to have given a sort of "word of command" to his followers. He, by himself or by his friends, retained possession of the building during the whole night, in order that the keys and locks might be changed, and placed in the power of his own supporters, so that they might be in a condition to keep out what I think I may fairly term "the enemy." And with this object, in order to sustain their spirits or their strength during the watch, Mr. Shipway himself supplied them with beer from a neighbouring public-house, although to a very moderate amount only. From that moment he was virtually reinstalled as minister; and

* 357 although I feel great regret at * the whole course of proceedings, yet it is my duty to declare my opinion, that this reappointment was a nullity, and that it was accompanied by very unbecoming irregularity. His opponents were however advised, that he could not be lawfully displaced until the year of probation, for which he had been appointed, was over, and for this reason no suit was instituted until the month of January in the present year.

Whilst the defendant Mr. Shipway was in possession thus irregularly, the ceremony called "ordination" took place. It does not appear what that amounts to, or what it precisely means. I collect that it is considered equivalent to institution and induction in the Church of England, although there is little or no evidence upon that point. There were certainly some forms observed; ministers from other places attended and took part in them. This ceremony, however, was, under the circumstances which existed, wholly immaterial.

Early in the present year this bill was filed, and affidavits were

made of great bulk. A motion for an injunction was then brought on before the Vice-Chancellor, but on that occasion it was suggested that an answer should be put in and the motion converted into a motion for a decree ; and it was arranged that it should be so.

Whilst the matter was thus standing over, a notice was given, bearing date the 31st of March, but not delivered before the 2d of April, which was a Saturday. The notice was to this effect, that on Sunday, the 3d of April, after morning service, a church-meeting would be held in the chapel to enable the men members of the congregation to resolve whether they did or did not desire that Charles Shipway should continue to be their minister.

This notice was signed by three of the *deacons, who * 358 are defendants in this suit, and two of those three deacons are also trustees. I will not lay any stress upon the words "men members," nor on the expression "continue to be their minister ;" not, however, only was this notice given *pendente lite* while the matter was standing to be heard, but the practice, so far as the Court has the means of judging, has always been to give notice of any meeting in the chapel itself upon a Sunday, for which practice there may be good reason. This notice was not given upon any Sunday, but upon a Saturday, for the next following day, it was given in an entirely new form, and the meeting was called not only *pendente lite*, but while possession of the chapel itself and administration of its affairs were in the condition induced and sustained by the anomalous and irregular proceedings of the 4th of July of the previous year. Therefore this meeting also was a mere nullity, and notwithstanding the so-called ordination of September, 1858, and the election of the 3d of April, 1859, the matter stands upon the election or re-election of the 4th of July, 1858, which forms no title at all.

The decree of the Vice-Chancellor has only protected the plaintiffs by declaring not who is the minister of the chapel, but that a particular individual is not. Although the plaintiffs' case might have been much narrowed, yet we must remember that it is often impossible for a plaintiff to know what will be the particular views or facts which will most influence the opinion of the Court. I am of opinion that the circumstances do not warrant a departure from the decree pronounced by the Vice-Chancellor.

THE LORD JUSTICE TURNER. — It is much to be lamented
 * 359 that such a case as this * should have been brought into
 Court. It affords a melancholy instance of the extent to
 which strong personal feeling may be carried, but with these
 considerations the Court has nothing to do. It is the duty of the
 Court to decide according to the legal and equitable rights of
 the parties before it. [His Lordship read the trusts of the deed.]
 Those trusts would necessarily involve the appointment of a
 minister through whom divine worship might be performed in
 the chapel, but that appointment was to be made not by the
 trustees, but by the congregation, for whose benefit the appoint-
 ment was to be made. If an election is not held according to
 the rules and practice of the body, every member has a right to
 complain of an undue execution of the trust; and if he has
 such ground of complaint, he has a right to come to this Court
 for relief. This bill was, therefore, properly filed.

But it is said on behalf of the defendants, that the plaintiffs
 have seceded from the congregation, and have removed from the
 chapel the books and cushions. I do not, however, look upon
 this as a withdrawal in the light of a cessation from membership.
 I consider it to have been simply a withdrawal in consequence of
 the unlawful conduct of the defendant Shipway and of those
 who support him, and I think, therefore, that those persons are
 entitled to appeal to this Court. It might have been more strictly
 correct if the bill had been filed by them on behalf of themselves
 and all others interested, but that is only a matter of form, and
 if it had been necessary, leave would have been given to amend
 the bill in that respect. What, then, are the facts of the case?
 [His Lordship stated the material circumstances appearing on
 the affidavits.]

* 360 * In my opinion the election of Mr. Shipway in July,
 1858, was not valid, and cannot be supported. I think so
 upon two grounds; in the first place because no due notice had
 been given of the intention to hold the meeting, and, in the next
 place, because this pretended meeting was composed of members
 and non-members, and there can be no due and valid election
 unless it is confined to the members of the congregation only,
 without the interference of those who have not the rights of
 membership. For these reasons the alleged election in July,
 1858, appears to me to be entirely out of the case.

Then, in the September following, there came the ordination, as it is called, and all that is before the Court upon that subject is contained in the answer of the defendants, which alleges that by the desire of the church and of the congregation, Mr. Shipway was ordained to be minister. But who composed the church-meeting, and how the alleged desire was expressed in no way appears either by the answer or otherwise. I think, therefore, that the ordination must also be laid out of the case.

There remains, then, nothing but the election of the 3d of April, 1859, and the question is, whether that election was a valid election, and one which entitles the defendant Shipway to retain his position as minister. I do not intend to say that the circumstance of the case being under the jurisdiction of the Court, precluded the congregation from the right of expressing their views and opinions upon the subject, nor will I say that the Court will refuse to attend to those views and opinions, but the pendency of this suit rendered it incumbent upon the parties to take care that every rule and observance * which * 361 had been acted upon in former instances, should be strictly adhered and attended to. This does not seem to me to have been the case in this instance, and the meeting then held was not, I think, of such a character that the Court can attend to the conclusions which it adopted.

It was contended on the part of the defendants that, if the defendant Shipway was not actually displaced by the congregation, he continued as minister; but that rule can have no application to a case where there is nothing more than an unauthorized assertion of a permanent appointment.

The decree is, therefore, in substance right, and must be upheld.

Appeal dismissed without costs.

* 362 * THE LONDON, BRIGHTON AND SOUTH COAST
RAILWAY COMPANY v. THE LONDON AND
SOUTH-WESTERN RAILWAY COMPANY.

1859. April 20, 21, 30. June 8. Before the Lord Chancellor Lord CHELMSFORD and the Lord Justice TURNER.

The Brighton Company and the South-Western Company became jointly entitled to a line of railway, under an Act of Parliament made in 1847, by which this joint line was placed under the management of a joint committee. By this Act it was provided that each of the two companies might use the joint line for all purposes necessary for the traffic of the same respective company. The South-Western Company afterwards, without Parliamentary authority, entered into agreements with the Portsmouth Company, by which the South-Western Company was to have the exclusive use of the line of the Portsmouth Company, paying 18,000*l.* a year.

Held, that the Act of 1847 did not create a joint tenancy carrying with it the right of using for every kind of traffic a station appurtenant to the joint line, and that the South-Western Company had no right to use it except for what was properly traffic of that company.

Held also, that the agreements between the South-Western Company and the Portsmouth Company were *ultra vires* and illegal, and that the conveyance of passengers and goods under them did not constitute traffic which could be considered traffic of the South-Western Company within the meaning of the Act of 1847.

Held, therefore, that the Brighton Company were entitled to an injunction, restraining the South-Western Company from using the joint station for the purposes of any traffic destined for or coming from the Portsmouth Railway or any part thereof.¹

THIS case first came before the Court on a motion by way of appeal from Vice-Chancellor WOOD, for an injunction to restrain the London and South-Western Railway Company from using the Landport station (which belonged to them and the plaintiffs jointly) for the booking or transport of passengers or goods destined for or coming from the Portsmouth Railway or any part thereof, except so far as related to the transmission upon the lines of railway laid down in the station of traffic conveyed on the public service to and from a certain line belonging to the Crown.

In the year 1847, the Brighton and Chichester Railway Com-

¹ See Kerr Inj. 322; 2 Joyce Inj. 844-846; Kent Coast Railway Co. v. London, Chatham, & Dover Railway Co., L. R. 3 Ch. Ap. 656.

pany had a line of railway called the Portsmouth Extension Railway, part of which ran between Havant and Portsmouth. It was in that year agreed between the London, Brighton, and South Coast Railway * Company (which, for brevity, will * 363 be called the London and Brighton Company, and the London and South-Western Railway Company, that they should jointly become the owners of this portion of the Portsmouth Extension Railway, which the London and Brighton Company had then already agreed to purchase. Accordingly, an Act of Parliament, 10 & 11 Vict. c. 244, was obtained, called "The Brighton and Chichester (Portsmouth Extension) and London and South-Western Railways Act, 1847." By this Act, after reciting that it would be of public advantage to vest in the London and South-Western Company and the London and Brighton Company so much of the Portsmouth extension of the Brighton and Chichester Railway as was or might be constructed between Havant and Portsmouth (which extension railway the plaintiffs, the London and Brighton Company, were mentioned in this recital to have contracted to purchase), powers were given by section 2 to the London and Brighton Company and the Brighton and Chichester Company to sell, and to the London and South-Western and the London and Brighton Companies to purchase such part of the portion of the Extension Railway lying westward of the junction near Havant, between the line of the extension railway and the line of the then intended Direct London and Portsmouth Railway, as the companies should define and agree upon, and the stations and other works and conveniences connected with the same portion, which part so to be defined and purchased, and the stations, works and conveniences connected therewith, were thereafter referred to as "the joint line." After providing for the conveyance to be made upon the completion of the sale and purchase, it was enacted by section 5, that the conveyance, when executed, should be effectual to vest the joint line, and all the rights, privileges, powers and authorities by any Act or Acts of Parliament relating * thereto, * 364 or otherwise given to or vested in the companies selling, or either of such companies with reference to the same, with the appurtenances, jointly in the companies purchasing; and by section 6, that when the conveyance should have been executed, all the powers, rights and privileges by any Act or Acts of Parliament or otherwise given to or vested in the London and Brighton and

Brighton and Chichester Companies, or either of them, and for the time being in force, should, so far as they might relate to the joint line, apply to and be vested in the London and South Western and London and Brighton Companies jointly, and might be used, exercised and enjoyed by the same companies jointly, and by such joint committee as thereafter provided for respectively. It was further enacted by section 9, that for the better management of the joint line, a joint committee consisting of three directors of each of the two purchasing companies should be appointed for carrying the provisions of the Act so far as the same related to the making and maintaining the joint line, and to the other things to be done by the joint committee as therein provided, into execution; and that the joint committee should have the like powers, privileges, and indemnities as might have been exercised by the companies selling, or either of them, if they had not sold. By section 11, that the joint committee should be subject to all such by-laws, regulations, and provisions, as might from time to time be agreed upon by the boards of directors of the two purchasing companies respectively, and that, except so far as should be otherwise provided by such by-laws, regulations, and provisions, the majority present should at all meetings of the joint committee bind the minority and all absent members, and the chairman should be chosen alternately from among the members appointed by each of the boards, and should have a casting vote, and three members of the joint committee should form a quorum,

* 365 * with a proviso that such three members should not be those appointed by one of the boards, except in certain cases therein mentioned arising from the default of the other board. By section 12, that the joint committee should appoint the officers and servants to be employed on and with reference to the joint line, except those employed by the purchasing companies, or either of them, in the conveyance of passengers, animals, and things, or the use of carriages, engines, or other power on the joint line, and with a proviso that either of the purchasing companies might, at the expense of such company, appoint its own booking-clerks, who were not to be removable by the joint committee; and by section 13 as follows: "That subject to the control and management of such joint committee, and the provisions of any and every Act of Parliament, for the time being, relating to the joint line, or to the two companies, or either of them, each of the two companies may at all times hereafter use the joint line

for the purpose of conveying passengers, animals, and things upon the same, and for all such other purposes as shall be necessary for the traffic or business thereon of the same respective company." It was further enacted by section 14, that the joint and several funds of the two purchasing companies should be liable for the payment and satisfaction of all liabilities incurred by the joint committee. By section 15, that an equal half part of the costs and expenses of making, maintaining, and managing the joint line should be paid by each of the two purchasing companies. By section 18, that the rates, tolls, and other charges to be demanded and received from and by the two companies respectively, in respect of passengers, animals, and things conveyed by the same companies respectively upon the joint line, or any part thereof, and for the use of carriages and engines, or other power supplied by the same companies respectively thereon, should from time to time be determined by the joint committee; and by section 20, that the joint committee might demand and receive from any other railway company or railway companies, who might use the joint line or any part thereof, such rates, tolls, and charges, for the use thereof, as such joint committee should from time to time think fit and determine. It was also enacted by section 22, that the profits to be received by each of the purchasing companies in respect of the joint line should be paid to the joint committee, and after payment of the expenses payable by the joint committee in respect of the joint line, should be paid by the joint committee to the two companies in equal shares. By section 23, that all the expenses incurred in respect of the joint line, exclusive of those incurred by the two purchasing companies, or either of them, in the conveyance of passengers, animals, or things, or the use of carriages, engines, or other power, on the joint line, or any part thereof, and all liabilities incurred in respect of the joint line by the loss of animals or things, accidents or otherwise, occasioned by the joint committee, or the officers or servants employed by them for the joint purposes of the two purchasing companies, should be paid by the joint committee out of the general funds in their hands in respect of the joint line; but that all expenses incurred by either of the two purchasing companies in the conveyance or transmission of passengers, animals, or things, or the use of carriages, engines, or other power, on the

joint line, or any part thereof, and all liabilities incurred in respect of the joint line by the loss of animals or things, or by accidents or otherwise, which should have been occasioned by the respective companies, or the officers and servants in their exclusive employment respectively, should be borne by the respective companies. By section 24, each of the two purchasing companies was to deduct from the gross amount of the

* 367 rates, tolls, and charges received by the * same company in respect of the joint line one equal fourth part or such other proportion as should from time to time be appointed by the joint committee, as the expenses of working on the joint line, to be borne by the same respective company; and the residue of such gross amount, after making such deduction, was to be considered as the amount of such profits received by the same respective company, and to be paid to the joint committee accordingly. Section 27 provided that notwithstanding any thing therein contained, the two purchasing companies might from time to time enter into and carry into effect any contract between themselves with reference to the mode of ascertaining the profits of the joint line, and the division of such profits, and the costs and expenses of making, maintaining and managing the joint line, and the expenses of working the same, and the liabilities to be incurred in respect thereof.

After the passing of this Act, and on the 9th of October, 1858, an agreement under seal was entered into by the Brighton and Chichester, the London and Brighton, and the London and South Western Companies, purporting to be made under the powers of the Act. By this agreement the terms of purchase of a definite portion of the extension line, according to the Act, were agreed upon, and the contract then proceeded to make various regulations between the London and Brighton, and London and South Western Companies. By the 9th clause it was provided that each company should deduct 30%. per cent from the gross amount of the rates, tolls, and charges received by the same company in respect of passengers, animals, and things, carried on the joint line, only, and also in respect of London traffic, as defined by the 11th clause, and that the residue should be considered the amount of profits in respect of the joint line, and be paid to the com-
* 368 mittee accordingly. * By the 11th section the term "London traffic" was defined as follows: —

“ By the term ‘ London traffic,’ employed in the 9th and other articles of this contract, shall be meant, as regards the said Brighton Company, all passengers, animals, and things, conveyed or transmitted by the said company, and which going northward shall pass over the joint line, or any part thereof, or any part of the said Portsmouth extension of the Brighton and Chichester Railway, lying within three miles of the point at which the joint line crosses or nearest approaches the street turnpike road, and be delivered at any point within ten miles to the southward of the New Cross station of the London, Brighton, and South Coast Railway, or at the same station, or at any point to the northward of the same station, or which going southward shall pass from any point to the northward of the same station, or from the same station, or from any point within two miles to the southward of the same station, and be delivered at any point on the same extension railway lying within three miles of the point at which the joint line crosses or nearest approaches the street turnpike road, or at any point on the joint line ; and, as regards the said South-Western Company, all passengers, animals and things conveyed or transmitted by the same company, and which going northward shall pass over the joint line, or any part thereof, or any part of the London and South-Western Railway lying within two miles of the point at which the joint line crosses or nearest approaches the street turnpike road, and be delivered at any point within two miles to the southward of the Wandsworth station on the London and South-Western Railway, or at the same station, or at any point to the northward of the same station, or which going southward shall pass from any point to the northward of the same station, or * from the * 369 same station, or from any point within two miles to the southward of the same station, and be delivered at any point on the London and South-Western Railway lying within two miles at the point at which the joint line crosses or nearest approaches the street turnpike road, or at any point on the joint line ; and, as regards each of the two companies, all passengers, animals, and things, conveyed or transmitted by the same respective company, and which, in the ordinary and regular course of business, and but for any arrangements of the same respective companies to the contrary, would be or have been ‘ London traffic ’ as hereinbefore defined.”

Article 12. " Except as regards passengers, animals, and things, carried on the joint line only, and ' London traffic ' as defined in the 11th article of this contract, each of the two companies shall be entitled, for its own exclusive use, to all such rates, tolls, and charges as shall be received by the same respective company in respect of the joint line."

The 18th article provided that the London and South-Western Company should not, at any time, make or attempt to make any arrangement or hold out any inducement for the purpose or with the tendency of unfairly and in any way contrary to the spirit of the contract and the intent of the London and Brighton Company in entering into the same, attracting or otherwise diverting to the line of the London and South-Western Railway running through Farnham to and from Gosport any of the traffic which in the ordinary and regular course of business and but for such arrangements or inducements would be traffic on the joint line or ' London traffic ' as defined by the 11th article, or traffic of the Brighton Company. By the 19th article it was provided that neither of the two companies should, at any time thereafter, make or attempt to make any arrangement or hold out any inducement for the purpose or with the tendency of unfairly, &c., attracting * 370 or * diverting into the line of such company any traffic which, in the regular course of business, would otherwise be traffic in the joint line or London traffic or traffic of the other company.

The part of the extension railway which was thus purchased was conveyed to the London and South-Western and London and Brighton Companies accordingly, by a deed dated the 10th of March, 1851. This purchased part of the extension railway lay between Hilsea and Portsmouth, at the western or Portsmouth end of the extension railway. It was not in immediate connection with the point of junction of the Direct Portsmouth Railway above referred to, there being a part of the extension railway not mentioned in the purchase which intervenes between the part of it which was purchased and the above-mentioned point of junction, and which intervening part, at the time of this suit, belonged to the plaintiffs. The purchased part of the extension railway was, however, connected with the South-Western Railway at

Cosham, near Hilsea. The Landport station was at the Portsmouth end of the purchased part of the extension railway.

In August, 1852, the two companies arranged the terms of another agreement, which, not being under seal, was not binding upon them, but which was commented upon as showing an apprehension that their interests might be affected by a new line of railway being formed in the district intermediate between their two lines, and their determination to co-operate in opposition to any such project. By this agreement, among various stipulations tending to prevent competition between the two companies, it was agreed that no new line should be promoted or supported in any way, directly or indirectly, by either company without the assent of the other in any * portion of the district * 371 intermediate between the London and South-Western and London, Brighton, and South Coast Railways; and that, in case of any such line being projected by third parties, either company might call on the other to afford any legitimate aid and co-operation in its power with respect to it. It was through this district that the Portsmouth Railway was afterwards made.

The power to make this railway was conferred upon the Portsmouth Railway Company, which was incorporated for this purpose by an Act passed in the year 1853, which empowered them to make a railway from Havant to Godalming. In the year 1858, the company obtained powers, by an Amendment Act, 21 & 22 Vict. c. 101, to extend their line from Havant to Hilsea; but, as in thus extending the line between these two points they would have had to have carried it the whole way by the side of the railway belonging to the plaintiffs, powers were given them of acquiring the right of using this portion of the plaintiffs' line, and also the joint line between Hilsea and Portsmouth and the joint station at Landport. These matters were provided for by the 35th and 36th sections of the Amendment Act. By the 35th section it was enacted, "that it shall be lawful for the company and all other companies and persons lawfully using the Portsmouth railway to pass over and use with their respective engines and carriages the railways, or portions of railways, hereinafter mentioned, together with the stations, watering-places, water, sidings, platforms, booking and other offices, works, warehouses, buildings, conveniences, and accommodations upon the same or connected therewith; that is to say" [then followed an enumeration of

various railways and parts of railways, and, *inter alia*], “ so much of the railway of the London, Brighton, and South Coast Railway Company, as will be situated between the point of
 * 372 junction * with that railway in the parish of Havant, on the Portsmouth Railway, and the point at or near Hilsea redoubt, where the London, Brighton, and South Coast Railway unites with the line to Portsmouth belonging to that company and the London and South-Western Railway Company, or one of them, and also of the line of railway to Portsmouth belonging to the two last-mentioned companies, or one of them, between the before-mentioned point at or near Hilsea redoubt and the terminus of the said railway at the Landport road. . . . Such powers of passage or of user being in each case to be exercised on such terms and conditions as, failing an agreement between the companies, shall be settled by the principal engineers thereof, or, in case of their difference, by some person to be mutually appointed and agreed on by them ;” or, in case of no umpire being so appointed, then by some person to be appointed by the Board of Trade : and it was enacted, that all reasonable accommodation should be provided by the companies upon their stations and lines for the Portsmouth Company. It was provided, nevertheless, that (except as thereafter provided) nothing in this Act contained should confer on the company, or on any such other company or person as aforesaid, any powers of user of the joint station at Landport, in the parish of Portsea, of the London and Brighton and London and South-Western Companies, for any purpose other than the transmission upon the lines of railway laid down in the said station of traffic conveyed on the public service. The 36th section provided that the company and the owners, for the time being, of the said joint station at Landport might agree for the use by the company, or such other company or person as aforesaid, of the said joint station, or any part thereof, for the general traffic of the company, on such terms and conditions as should be mutually agreed on for the
 * 373 use of the joint * station, and if no such agreement should be come to, then the Portsmouth Company, before the expiration of a year, were to erect a station for themselves.

On the 23d of December, 1858, the London and Portsmouth and London and South-Western Companies entered into an agreement that the two companies should apply to Parliament in

the then ensuing session, for an Act to authorize the Portsmouth Company to grant, and the South-Western Company to accept, a lease of the Portsmouth Company's undertaking for a term of 999 years from its opening for traffic, or until it should be merged in the South-Western Company, at a rental, payable half-yearly, of 18,000*l.* a year, commencing on the 15th of January, 1859; and the 3d clause of the agreement was as follows:—

“The application to Parliament, mentioned in article 1, shall be at the joint and equal expense of the two companies, and shall, in the event of failure, be repeated in 1860 at the like expense; and the South-Western Company shall exclusively, as regards the Portsmouth Company and all others claiming under their license or by contract with them, work and use the Portsmouth undertaking in the mean time, keeping the same in good and sufficient repair and working order, and paying half-yearly to the Portsmouth Company a clear sum at the rate of 18,000*l.* a year, and the outgoings which would have been payable in respect of the time of such working by the South-Western Company, according to article 1, if the intended lease had been authorized and executed, and so in proportion for any less period than a year.”

The second agreement was dated the 24th of December, 1858. It recited that by a local Act of the 1st of her present Majesty, c. 71, it was, after reciting that it would tend much to the convenience of the public if railway companies were empowered to enter into mutual arrangements, *so as to * 374 avoid the necessity of a change of carriages, and other delays arising from a diversity of interest enacted that the South-Western Company (then called the London and Southampton Railway Company) and all other railway companies, might enter into contracts for the division or apportionment of tolls or rates, or for the passage of engines or carriages over their respective lines of railway, upon the payment of such tolls or rates, and under such conditions and restrictions as might be mutually agreed upon. It then recited that the Railway Clauses Consolidation Act of 1845 applied to the Portsmouth Company, and that, under section 87, they had the power to make contracts with respect to the passage over their line of railway of the

engines, &c., of the South-Western Company, upon the payment of such tolls, and under such conditions and restrictions as might be mutually agreed on between the two companies, and for that purpose to enter into any contract for the division or apportionment of the tolls to be taken on their respective railways. Then it recited the Portsmouth Railway Amendment Act of 1857, 20 & 21 Vict. c. 18, by which power was given, as it was said in this recital, to the Portsmouth Company and the South-Western Company "to enter into and carry into effect such agreements and arrangements as they might think fit in respect of the regulation and arrangement by the Portsmouth Company and the South-Western Company, or either of them, of the traffic upon or over their respective railways or either of them, or any part thereof, and with respect to the division and apportionment between those companies of the expenses incurred, and of the tolls, rates, and charges received in respect of such traffic" (sect. 17), omitting a condition contained in the next clause of the Act (sect. 18), that no such arrangement or agreement should operate

until approved of by the Board of Trade. The agreement * 375 then recited that "it would tend to the * convenience of the public, and would be of mutual advantage to the two companies, if arrangements were made with respect to the user by the South-Western Company of the railway of the Portsmouth Company, and the regulation and management by the South-Western Company of the traffic thereon, in connection with the traffic of the railway of the South-Western Company, and the two companies had accordingly determined to enter into the agreement thereafter appearing, but subject and without prejudice to the rights of all other companies."

Then the first clause of the agreement was, that "this agreement shall commence and take effect as on and from the 1st day of January, 1859, and shall continue in force until either the railway as hereinafter defined is leased to the South-Western Company, or the two companies become united, or one of them is merged in the other," the lease or the union being with the sanction of parliament. By section 3 it was provided that the term "local traffic," wherever thereafter used, should mean and include traffic of all kinds originating and terminating on the Portsmouth Railway, and all other traffic on the Portsmouth Railway not coming from or proceeding to any railway of the South-Western

Company, or over which they were entitled to pass and run independently of that agreement. And by article 4, the expression "through traffic" wherever thereafter used was to mean and include all other traffic on both the Portsmouth Railway and any railway of the South-Western Company respectively, to which this present agreement related. By article 5, the word "traffic" wherever thereafter used was to mean and include both local traffic and through traffic. By article 11, it was provided that the South-Western Company might, during the continuance of that agreement, demand, receive, collect, and recover all tolls, fares, rates, and charges, receivable *in respect of *376 "the traffic," including therefore both the through traffic and the local traffic, and that the Portsmouth Company would do and concur in all such things as might be necessary or reasonably required, for enabling the South-Western Company, by themselves or in the name of the Portsmouth Company, to demand, collect, and recover the same.

By article 15, all sums received or receivable during the continuance of that agreement by the Portsmouth Company, for or in respect of the Portsmouth Railway and the local traffic whatsoever, and the through traffic whatsoever respectively thereon, and all sums received or receivable during the continuance of that agreement by the South-Western Company, for or in respect of the tolls, fares, rates, and charges for the local traffic whatsoever, and the through traffic whatsoever respectively, for or in respect of the South-Western Company's line of railway between London and Godalming, and the traffic whatsoever thereon, were to form a joint fund to be divided and apportioned between the two companies according to that agreement. Then, by article 17, the amount of the joint fund was from time to time to be divided or apportioned between the two companies half-yearly during the continuance of this agreement (the half-years ending respectively on the 30th day of June and the 31st day of December in every year) as follows: namely, there was to be paid thereout to the Portsmouth Company in the first place, and as the first charge thereon, the sum of 9000*l.*, and all arrears, if any, thereof, not paid for any preceding half-year; but if the contract should expire or determine during any half-year, the payment for the broken half-year was to be only a due proportion, and the residue of the

fund, after payment of expenses, was to be paid to the South-Western Company.

* 377 After the filing of the bill, a third agreement, dated the 24th of February, 1859, was entered into between the South-Western Company and the Portsmouth Company. By that agreement, after reciting that the two companies had agreed to enter into a temporary arrangement respecting the user by the South-Western Company of the Portsmouth Railway until a more extended agreement should have been approved by the Board of Trade, or until a bill then before Parliament for authorizing an amalgamation or lease of the Portsmouth Railway with or to the London and South-Western Railway Company, and for other purposes, should have become law, it was witnessed by article 1, "This agreement shall commence and take effect as on and from the first day of January, 1859, and shall continue in force until a more extended agreement shall have been approved by the Board of Trade, or until the before-mentioned bill shall have become law." By art. 3. "The South-Western Company shall be entitled, during the continuance of this agreement, to use the Portsmouth Railway for the free passage over and along the same of the engines and carriages of every kind of the South-Western Company." Art. 4. "The South-Western Company will, during the continuance of this agreement, fairly and efficiently work their traffic upon and over the Portsmouth Railway, and make proper and sufficient arrangements for all the exigencies thereof." Art. 5. "The South-Western Company will, during the continuance of this agreement, pay all the expenses of and incident to the exercise of their rights under this agreement, and will indemnify the Portsmouth Company from and against the same, and all claims and demands in respect thereof." Art. 7. "The South-Western Company, in respect of their user of the Portsmouth Railway under this agreement, will pay to the Portsmouth Company the full maximum tolls demandable or receivable by the Portsmouth Company in respect of the same."

* 378 Art. 10. "The South-Western * Company shall cause to pass over the Portsmouth Railway such an amount of traffic as shall cause the payments to be made to the Portsmouth Company under this agreement for and in respect of tolls as aforesaid to be after the rate of 18,000*l.* per annum at the least

for the whole of the period during which this agreement shall continue in force." Art. 12. "Either of the companies may, at any period of the year, without regard either to the date of the commencement of this agreement, or any half-yearly day of payment, determine this present agreement, by giving notice in writing under their common seal of such their desire to the other company." Then followed a provision for the service of the notice.

On the 31st of December, 1858, the plaintiffs filed their bill, praying for an injunction, as stated above, to restrain the London and South-Western Railway Company from using the Landport station for passengers or goods coming from the Portsmouth Railway, and also to restrain them from using the line from Havant to Hilsea for the like purpose. At that time the Portsmouth Company had no right to carry goods or passengers over that part of the extension railway which belonged to the plaintiffs, and were therefore cut off from any connection with the joint line. The injunction as to the use of this part of the extension line was granted by the Vice-Chancellor; but after the filing of the bill, both the Portsmouth Company and the South-Western Company acquired the right to use this intervening portion of the extension railway, by virtue of an award made under the provisions of the Act of 1858, and this part of the plaintiffs' case therefore was at an end. The Vice-Chancellor refused to grant an interlocutory injunction as to the use of the Landport station, and a motion by way of appeal was opened on the 8th of February, 1859, when it was arranged that the London and South-Western * Railway should keep an account, and * 379 that the cause should be heard by the Court of appeal on a motion for a decree, the bill in the mean time to be amended, by charging the illegality of the agreements between the London and South-Western and the London and Portsmouth Companies, which agreements were not produced before the Vice-Chancellor.

Mr. Rolt, Mr. Willcock, and Mr. J. H. Taylor, for the plaintiffs. — Assuming the agreements between the London and South-Western Railway Company and the Portsmouth Railway Company to be legal, so as to make the former company lawful owners of the Portsmouth Railway, we contend that they cannot use the joint stations for the purposes of the Portsmouth traffic.

This part of the case divides itself into two branches. As regards traffic originating on the Portsmouth line, it seems too clear for argument that they cannot use the station for that. They have a joint user of the station with us; but that is a joint user for the purpose only of their own traffic, not of the traffic of the Portsmouth Company. They are lawful substitutes of the Portsmouth Company, but as such they cannot do what the Portsmouth Company itself could not. The 13th section of the Act of 1847 defines their right, a right of user for the South-Western traffic. They rely on that section, but it clearly was never intended to apply to the traffic of other lines of which they might become the owners.

As to traffic not originating on the Portsmouth line, but carried to places on that line, the case is not quite the same, but we submit that the same principle applies. When such traffic has reached the Portsmouth Railway, it becomes Portsmouth traffic, just as much as if it had originated on the Portsmouth line.

* 380 * The London and South-Western Railway Company, however, are not legally using the Portsmouth Railway. That the agreement between the defendant companies is illegal is plain; *Great Northern Railway Company v. Eastern Counties Railway Company*. (a) Now, even assuming that the Portsmouth traffic, if legally carried by them, would become their traffic, so as to entitle them to use the joint station for the purposes of such traffic, yet, if they are illegally working the Portsmouth line, the traffic on that line cannot be their traffic, within the meaning of the Act. If we refer to the agreement between the plaintiffs and the London and South-Western Company, the case is strengthened, the acts now done are in direct violation of the spirit of that agreement. The London and South-Western Company argue that all traffic which they carry over the joint line is theirs, that being a line which they have a right to use, and that the traffic being theirs, they have a right to use the station for it. But the character of traffic must be determined before it gets to the joint line. There is no station where it enters the joint line, and it cannot change its character by coming upon it. The course taken by the defendants is a scheme in fraud of the Act of 1858, the object of the legislature in which was to prevent the Portsmouth traffic from coming into the

(a) 9 Hare, 306.

Landport station. Three classes of traffic may be carried on the joint line. Traffic carried solely on that line, traffic brought to it by and carried along it by the plaintiffs or the South-Western Company, and traffic brought to it by other companies. There is nothing to prevent the joint committee from charging tolls for the third description of traffic according to quite a different scale. The Portsmouth Company is the very company to which it must have been contemplated that this power would apply.

* [THE LORD CHANCELLOR. — The question is, whether, * 381 as the London and South-Western Company have acquired the Portsmouth line, the traffic upon it is not their traffic.

[THE LORD JUSTICE TURNER. — Suppose they had acquired the right to make a line from Basingstoke to Reading, could they not have used the station for that traffic?]

Yes. That would have been their traffic, arising from a legitimate extension of their own line. If a man has a right to store goods of his own in a house, it does not follow that he can use it to store other person's goods. An extension of the line of either company in the ordinary course, by the authority of the legislature, may be fairly assumed to have been within the contemplation of Parliament, but it is not to be assumed that the legislature contemplates one company buying up the line of another.

Sir R. Bethell, Mr. Giffard, and Mr. Baggallay, for the London and South-Western Company. — The argument of the other side proceeds on a fallacious assumption, that the traffic coming from the Portsmouth line is Portsmouth traffic when it comes to the Landport station. In fact, before it comes to that station it has passed over the joint line, has acquired the character of South-Western traffic, and is presented at the station as such by the South-Western Company in their own right, and not as acting in the place of the Portsmouth Company. Why cannot the South-Western Company bring goods from all quarters of the world to Hilsea, and then carry them over the joint line? If they can, that settles the whole question. The case of the

Shrewsbury and Chester Railway Company v. Chester and Holyhead Railway Company, (a) is strongly in our favour.

* 382 * The argument on the part of the plaintiffs ranges itself under four heads:—

1. The argument under the Act of 1847. The plaintiffs contend that the traffic for which we may use the station is only traffic passing over our then line, and that we cannot under that Act claim the use of the joint line and station for traffic from any other line which we may acquire. The question was put by the Court whether the contention went to exclude us from carrying traffic originating on a line between Basingstoke and Reading, and the argument, if good at all, must go thus far. There is no reason for such a restriction, unless you can find something restrictive in the Act of 1847. Now there is not a word in the Act to show that it was intended to apply merely to the then existing state of things. On the contrary, it was evidently intended to effect a permanent arrangement between the companies, and therefore cannot have been intended to apply only to the then existing traffic. It would be as reasonable to contend that a company could not increase the number of its passengers. Unless there is something restrictive of the use of the joint line and station to the then traffic, each company may use them for all traffic it can get from any quarter. We are in the ordinary position of joint tenants, and have the rights of joint tenants. Now it is absurd to suppose that one joint tenant of a road can exclude another joint tenant from the use of it, because the latter has derived further business, which he wishes to carry over it from a fresh source. The 6th paragraph of the agreement of October, 1848, shows how the companies themselves construed the Act. They contemplated an extension of traffic.

2. As to the argument on the Act of 1858, it is founded
* 383 on a misapprehension. The plaintiffs say that no one * can use the joint line and station under that Act, for traffic coming from the Portsmouth Railway, unless he is lawfully using that railway. Our answer is that we are not using them under that Act at all, we are using them by virtue of our ownership. The Act prohibits other companies from using the joint station, but does not interfere with our right to use it for our own pur-

(a) 14 Law Times, 433.

poses. The Act was not intended to interfere with the rights of the plaintiffs and the London and South-Western Company *inter se*.

3. As to our alleged illegal user of the Portsmouth line. Assuming it to be illegal, we say that as regards the plaintiffs it is *res inter alios acta*, and that the plaintiffs have no *jus tertii*, entitling them to inquire into the nature of our arrangements with the Portsmouth Company. Surely the plaintiffs have no right to stop our trains for the purpose of inquiring whence our passengers and goods come. There is no such illegality in the agreement as would prevent the Portsmouth Company from recovering from the South-Western Company what they agreed to pay. *Sharp v. Taylor*. (a) And as regards the public, there is no illegality at all. But we say that our user is legal, for the agreement now in force is only temporary, until the authority of Parliament can be obtained for a permanent one, and such an agreement is legal. *Mozley v. Alston*. (b) The illegality depends on the animus, on the intention to make a final agreement of such a nature as to be *ultra vires*. We have not agreed at once to take a transfer of the Portsmouth line, paying 18,000*l.* a year for it. We do not intend any thing of that kind till parliamentary powers for so doing have been obtained. At present we agree only to pay a toll, and to run so many carriages that the tolls * shall amount to 18,000*l.* There is nothing *ultra vires* in * 384 that, as is shown by *South Yorkshire Railway and River Dun Company v. Great Northern Railway Company*. (c) The Portsmouth Railway Company were not obliged to carry on their railway; they were at liberty not to use it; they were also at liberty to let us use it. They agree not to use it, and they agree to let us use it. What they were at liberty to do, they must be at liberty to bind themselves by contract to do. But in fact there is no occasion to inquire into the legality of our agreement; that is a matter with which the plaintiffs have no concern. The only question as regards them is, "Is the traffic *bonâ fide* South-Western traffic?" There cannot be any doubt that it is. We are not managing the Portsmouth Railway for the Portsmouth Company, but are working it for our own benefit and at our own risk, and

(a) 2 Phil. 801.

(b) 1 Phil. 790.

(c) 7 Rail. Cas. 744; 9 Exch. 55.

what is carried on it is as much South-Western traffic as the traffic on any of our own branch lines.

4. As to the agreements between the plaintiffs and the London and South-Western Company, on which the plaintiffs rely, as entitling them to relief, on the footing of contract, if they are not otherwise entitled. These agreements are all of them to a great extent *ultra vires*. Take the first. The companies had powers to contract as to the joint line, and as to the mode of ascertaining its profits. But the agreement makes them partners as to all traffic which, starting from the joint line, should get to London, or to any place within a limited distance from London, an arrangement which was thoroughly *ultra vires*; *Shrewsbury and Birmingham Railway Company v. London and North-Western Railway Company*. (a) The later agreements of 1852 and 1858 were not under seal, and therefore amounted to no more than negotiations. They were utterly illegal, and it was more meritorious in us to break than keep them.

Mr. C. T. Simpson for the *Portsmouth Railway Company*.

Mr. Willcock in reply.

Judgment reserved.

June 8.

THE LORD CHANCELLOR. — The question which the Court is called upon to decide in this case is, whether the defendants, the London and South-Western Railway Company, ought to be restrained by injunction from using a station at Landport which belongs to them and the plaintiffs jointly, for the booking or the transit of passengers or goods destined for or coming from the Portsmouth Railway, or any part thereof. [His Lordship then stated the facts of the case down to, and inclusive of, the Act of 1858, and proceeded as follows:] The meaning of the words "the companies" in the 35th section of the Act of 1858 must be ascertained with reference to the subject of the agreement in each case. On the one side there will always be the Portsmouth Company, or the companies lawfully using their railway, includ-

(a) 7 Rail. Cas. 531, 600; 4 De G., M. & G. 115.

ing the London and South-Western Company, as to the portion of the line which lies between Havant and Hilsea — on the other the London and Brighton Company, as to this portion of their own line, — and that company, with the London and South-Western Company, as to “the joint line.” It seems to me to be quite clear that this section of the Act does not intend to restrict in any way the user by the companies of their own lines, whether belonging to them separately or jointly, and that it is wholly directed to enabling the Portsmouth Railway Company, and other * companies, to obtain the right of using * 386 these lines. I think, therefore, the question between the companies will be found not to depend upon this Act, but will turn upon entirely different grounds. Of course this observation does not apply to the portion of the line between Havant and Hilsea, but of this the case may be entirely cleared; for, although at the time of filing the bill there had been no agreement under the 35th section of the Act of 1858, and therefore the plaintiffs prayed for an injunction to restrain the use of so much of their railway, yet since the bill was filed, the matter has been settled by arbitration, in the manner provided for by the Act, and therefore this part of the relief prayed may be put out of consideration. The case which the London and South-Western Company make is this. They say, “Under the 13th section of the Act of 1847, we are entitled to use the joint line (which includes the joint station) for the purpose of conveying passengers and goods upon the same, and for all such other purposes as shall be necessary for our traffic or business thereon. There is nothing in that Act to confine us to the particular line of our railway which then alone existed; we might, by extending that line, or by throwing out branches, have brought down any increased quantity of traffic to the joint line: we have arranged with the Portsmouth Railway Company to pass our traffic over their line, and when it arrives at the joint line we use that which is our own property, and which existed in us prior to the Act of 1858. That Act conferred no powers upon us as to this joint line, which would have been wholly unnecessary, as we possessed all the right we required without its aid.” The London and Brighton Company, on the other hand, say, the intention of the Act of 1847 was, that the joint line should be used for that which was strictly the traffic

belonging to the railways of the respective companies. This did not exclude the legitimate extension of those railways, * 387 but that * it never was intended to permit either company to bring traffic to the joint line which had passed over another and independent railway. That this would be unjust to them, as they have to bear a moiety of the expenses of maintaining the joint line, and yet, if the traffic comes on to the joint line, having commenced upon some part of the Portsmouth line, or proceeds upon the joint line and is destined only for some place upon the Portsmouth line, they would not be entitled to a share in the profits of the conveyance of the passengers or goods. And they contend that the agreements which the London and South-Western Company have entered into with the Portsmouth Company are illegal and void, and therefore they are either not "lawfully using" the Portsmouth Railway, or at all events the traffic which depends upon these agreements cannot be the traffic or business contemplated by the Act of 1847, which must be the lawful traffic or business of the London and South-Western Company.

I have already intimated my opinion that the Act of 1858, as to companies "lawfully using" the Portsmouth Railway, does not apply to the London and South-Western Company; but the other question remains, and it is a very important one, whether the circumstances under which that company has acquired the use of the Portsmouth Railway enable them to claim the traffic which passes over it as their traffic and business. To determine that question it will be necessary to examine the agreements which have been entered into between the two companies. They consist of three different instruments,—one called the "Heads of Arrangement," dated the 23d December, 1858; another, an "Agreement for Traffic Arrangements," dated the 24th December, 1858; and the third an "Interim Agreement for the user by the South-Western Railway Company of the Portsmouth Railway," dated the 24th of February, 1859. I think that * 388 * all these must be deemed and taken to be one agreement under which the use of the railway is transferred to the London and South-Western Railway Company. What, then, is the nature of these instruments? They are nothing more nor less than an abandonment of the management and use of their line by

the Portsmouth Company to the London and South-Western Company in consideration of a sum of 18,000*l.* a year. They are very ingeniously and carefully worded with the object of evading the objection which must be well known to exist to the transfer by one railway company to another of the rights and powers conferred by the legislature. The last of these instruments, which was entered into after the bill was filed, viz., the one of the 24th February, 1859, has been properly described as the result of a selection of the least objectionable parts of the former agreements for the purpose of more completely colouring the real object of the parties. But it has been argued that this last agreement, at least, must be valid, because it is a mere *interim* arrangement, which it is expressly provided shall only continue in force until a more extended agreement shall have been approved by the Board of Trade or until a bill before Parliament for authorizing an amalgamation or lease of the Portsmouth Railway with or to the London and South-Western Railway Company shall have become law. But this surely cannot be maintained. If the sanction of the Board of Trade or an Act of Parliament is necessary to render the agreement good, any agreement made before the authority obtained, which is essential to its validity, must be bad, and we are dealing with such an agreement. Can, then, these agreements, by which the management of the line and the benefit of the traffic of the Portsmouth Railway are virtually transferred to the London and South-Western Railway Company for a fixed sum annually, be held to be legal and binding on * the two companies? If not, the conveyance, under * 389 these agreements, of passengers and goods, which would otherwise belong to the Portsmouth Railway, cannot make them a part of the traffic and business of the London and South-Western Company. I think that the illegality of these agreements is established by the cases which were cited in the course of the argument, particularly by the case of *The Great Northern Railway Company v. The Eastern Counties Railway Company*, (a) *The East Anglian Railways Company v. The Eastern Counties Railway Company* (b), and *The Shrewsbury and Birmingham Railway Company v. The North-Western Railway Company* (c), where the Lord Chancellor (CRANWORTH), in advising the House, said (d),

(a) 9 Hare, 306.

(c) 6 H. L. Cas. 113.

(b) 11 C. B. 775.

(d) Page 136.

“ There is abundant authority to show that there are many contracts into which, without express authority, a railway company cannot enter. ‘ The Railway Clauses Consolidation Act ’ (a) authorizes every such company to run carriages, and generally to act as a carrier, on its own line of railway ; and by the next section the company is enabled to make arrangements with other companies, having continuous railways, for the use of their respective lines for their mutual benefit. All this would have been unnecessary if it had not been considered that but for such enactments no such power would have existed under the mere incorporation of the company for the purpose of making and maintaining a railway.” I cannot better express my opinion of these agreements than in the language of Lord Justice TURNER, when Vice-Chancellor, in the case of *The Great Northern Railway Company v. The Eastern Counties Railway Company* : “ They are framed in total disregard of the obligations and duties which attach upon these companies, and are an attempt
 * 390 * to carry into effect, without the intervention of Parliament, what cannot lawfully be done except by Parliament, in the exercise of its discretion, with reference to the interests of the public.” But it is said, “ Supposing the agreements are illegal, why is the London and Brighton Company to interfere ? If they are in violation of the Act of Parliament or are against public policy, it is the duty of the Attorney-General and not of private parties to question them ; if they involve an application of the funds of the company to purposes foreign from those for which it was incorporated, it is for the shareholders to complain.” But the London and Brighton Company do not attempt to impeach these agreements on account of their abstract illegality, but merely urge their illegality for the purpose of showing that the London and South-Western Company can acquire no rights under them which can affect their interests and property. So long as the London and South-Western Company confine themselves to the limits of the Portsmouth line, the London and Brighton Company have no interest in the question of the validity of these agreements ; it is only when they are attempted to be connected with the use of the joint line that they become complicated with the rights of the London and Brighton Company.

But it is argued on behalf of the London and South-Western

(a) 8 Vict. c. 20, § 86.

Company that whatever may be thought of traffic which commences or terminates upon the Portsmouth line in connection with the joint line, yet that traffic which begins upon any part of the London and South-Western line, or which ends upon any part of that line, though the Portsmouth line is used in the course of its transit, must at all events be regarded as traffic of the London and South-Western Company, and that the London and Brighton Company can have no right to inquire by what means it arrives at the joint line, or how * it is carried * 391 from the joint line to its destination on the London and South-Western Railway. This has always appeared to me to be the only difficult part of the case ; but, after carefully considering it, I have arrived at the conclusion that as all the traffic which passes over the Portsmouth line is carried upon it under the agreements which are illegal, it is immaterial where it comes from, or what is its ultimate destination, and that none of it can be regarded as the traffic and business of the London and South-Western Company within the meaning of the 13th section of the Act of 1847, upon which the whole question depends. It was suggested that the London and Brighton Company were opposing this user of the line by the London and South-Western Company to their own disadvantage, as the additional traffic which would be brought upon it would increase their own profits. But it is obvious that, under the definition of London traffic, in the agreement entered into in pursuance of the Act of 1847, a great quantity of traffic might be poured upon the joint line, in the benefit of which they would not be entitled to participate, and at the same time there would be an increased wear and tear of the line which they must contribute to make good. But whatever may be the prudence or propriety of this proceeding on the part of the London and Brighton Company, they are clearly entitled to resist all use of the joint line and station for any thing which is not part of the legitimate traffic and business of the London and South-Western Company.

I think, therefore, that it will be proper for the Court to make a declaration that the London and South-Western Company are not entitled to use the joint station at Landport for passengers or goods carried and conveyed under the agreements of the 23d and 24th of December, 1858, and the 24th of February, 1859, and * to grant an injunction restraining them from using * 392

the joint station for the booking or the transit of passengers or goods destined for or coming from the Portsmouth Railway, or any part thereof, &c., until further order.

THE LORD JUSTICE TURNER. — The principal question remaining to be decided in this case is, whether the defendants the South-Western Company are entitled to use the station at Landport belonging jointly to them and to the plaintiffs the Brighton Company for the booking or transit of passengers or goods destined for or coming from the Portsmouth Railway, or any part thereof, except for the transmission of traffic conveyed on the public service to or from the line belonging to the Crown, leading to the dockyard or other public establishments at Portsea or Portsmouth. The bill indeed raises the same question as to the right of the defendants the Portsmouth Company to the user of the Landport station, but the defendants the Portsmouth Company have not claimed and do not claim any such right, and this part of the case, therefore, may be laid out of consideration. There is, however, a subordinate question, which will be necessary for us to dispose of, as to the accounts which are prayed for by the bill. The defendants the South-Western Company having entered into agreements with the Portsmouth Company with respect to the use of their line and to the traffic upon it, claim the right to use the Landport station for the booking and transit of passengers and goods destined for and coming from the Portsmouth Railway, under the provisions of an Act of Parliament passed in the year 1847. On the other hand, the plaintiffs the Brighton Company insist that this Act of Parliament gives the defendants the South-Western Company no such right; and they also in the

first instance insisted on some agreements entered into * 393 between them and the * defendants the South-Western

Company as having precluded the exercise of such rights if in fact given by the Act; but they afterwards abandoned that ground and relied upon those agreements merely as expounding, as it was said, the Act of 1847. They further insisted, however, that the defendants the South-Western Company were precluded from this user of the Landport station by another Act of Parliament passed in the year 1858; and they contended that the defendants the South-Western Company were not lawfully using the Portsmouth Railway within the meaning of that Act, the

agreements entered into by them with the Portsmouth Company being, as the plaintiffs the Brighton Company insisted, illegal and void ; but the defendants the South-Western Company, on the other hand, contended that the Act of 1858 did not in any way affect their rights, and that the agreements between them and the Portsmouth Company were valid, and they insisted that, at all events, the plaintiffs the Brighton Company were not entitled to question the validity of those agreements. The first question to be considered, therefore, is whether the defendants the South-Western Company are entitled to use the Landport station for the purposes in question by virtue of the Act of 1847.

[His Lordship stated the material clauses of that Act, the purchase under it, the formation of the Portsmouth Railway, and the award under the Act of 1858, reducing the case to the right to use the Landport station, and then proceeded as follows :]

The defendants the South-Western Company, who have entered into agreements with the Portsmouth Company, which must presently be mentioned, claim the right to use this Landport station, both for the purposes of their own traffic carried over the Direct Portsmouth Railway and for the purposes of the traffic of the *Direct Portsmouth Railway carried by *394 them, upon two grounds : first, that the Act of 1847 created a joint tenancy between them and the Brighton Company in the joint line, including, of course, the Landport station, and that every joint tenant is entitled to the full use and enjoyment of the joint property ; and, secondly, that this right is expressly given to them by the 13th section of the last-mentioned Act.

As to the first point, whatever might have been the effect of the Act had the case depended upon the earlier sections of it, the ninth and subsequent sections seem to me sufficiently to show that it was not the intention of the legislature that the joint ownership of the joint line by the two purchasing companies should be attended with the incidents of joint tenancy to the extent contended for by the defendants the South-Western Company ; for by the ninth and subsequent sections, not only is the management of the joint line vested in the joint committee, composed, it is true, of an equal number of the directors of each company, but empowered, it is to be observed, to act when the

companies are not equally represented, but the profits to be derived by each of the two purchasing companies are made in a great measure to depend upon what may be done under the exercise of the powers vested in the joint committee; and several sections of the Act, and more especially the 13th section, refer to and provide for the separate interests of each of the two companies. I think, therefore, that the rights of the two companies must depend upon the provisions of the Act, and not upon the incidents of joint tenancy, and that the argument on the part of the South-Western Company, so far as it is founded on the joint tenancy, cannot be maintained.

Then, as to the claim of the defendants the South-Western Company, to the user of this station, under the

* 395 *provisions of the Act, the question seems to me to depend upon the construction of the 13th section; for, if we lay out of consideration the rights depending upon the joint tenancy, I see nothing in the Act which can give the right contended for, unless it be given by that section. The words of the section are, no doubt, very wide and extensive. They are that, subject to the control and management of the joint committee, and the provisions of any and every Act of Parliament for the time being relating to the joint line, or to the two companies, or either of them, each of the two companies may, at all times thereafter, use the joint line for the purpose of conveying passengers, animals, and things, upon the same, and for all such other purposes as shall be necessary for traffic or business thereon of the same respective company; but wide and extensive as these words are, they must receive a just and reasonable interpretation. This is an Act of Parliament which, as I view it, not only empowered the South-Western and Brighton Companies to purchase the part of the extension line which was purchased by them, but also gave effect to an agreement between those two companies with reference to that purchase, and the mode in which the property when purchased was to be held and dealt with between them. If we look at the Act with reference to the agreement between the two companies, it is surely unreasonable to suppose that these general words were intended by either of them to extend to the user of the joint line, including, of course, this Landport station, for the conveyance of passengers, animals, or things, which either of them was not lawfully entitled to

convey, or to traffic or business which either of them was not lawfully entitled to carry on; and if we take into account the intervention of Parliament in giving effect to this agreement, it is, I think, still more difficult to suppose that Parliament could have intended by these general words to authorize or sanction the user * of the joint line for any such convey- * 396
ance or traffic. It seems to me, therefore, that even admitting that these general words extend to authorize the user of this joint line, including this station, for the conveyance of all animals, passengers, and things, which either of these companies was, or might be, lawfully entitled to convey, and for traffic or business which either of these companies was or might be lawfully entitled to carry on, and I am not prepared to say that this extended meaning ought not to be given to the words, we are bound in construction to limit them to passengers, animals, and things, lawfully conveyed, and to traffic or business lawfully carried on. It may be said that this Act of Parliament contains no such limitation of these general words, but I should be sorry to hold that express provision was necessary in an Act of Parliament, in order to prevent general words from operating or sanctioning an infringement of the law. Where the words of an Act of Parliament extend to what is lawful and to what is unlawful, I apprehend that, in the absence of express provision or necessary construction, they can be applied only to what is lawful. Express provision or necessary construction is, I think, required to extend the general words, and make them operate to authorize what is unlawful, not to prevent them from being so extended.

This being my view of the construction of this Act, we have to look into the agreements between the South-Western and Portsmouth Companies, for the purpose of seeing, not merely whether the South-Western Company are lawfully using the Portsmouth Railway, within the meaning of the Act of 1858; but whether they are lawfully carrying the traffic in question, so as to bring the case within the Act of 1847. These agreements are three in number. The first of them is dated the 23d of December, 1858. [His Lordship here stated the material * parts of this agreement, as given above.] I think this is * 397
an agreement which these companies were not lawfully entitled to enter into. It is an agreement by the South-Western

Company, if not to become tenants of the Portsmouth Company of their undertaking, at all events to work and use their undertaking in the mean time, until Parliament should determine whether they should be authorized to become tenants of it or not, and I am not aware of any power given by law to railway companies to take upon lease or to work or use the lines of other railway companies, either permanently or temporarily. It is an agreement, as it seems to me, beyond the powers of the incorporation of either of these companies. [His Lordship then stated the recitals and the material provisions of the agreement of the 24th of December, 1858, and proceeded.] This second agreement seems to me to be, if possible, more vicious than the first. It is indeed more artfully drawn, for the purpose of making it appear that what was contemplated was a mere arrangement of tolls, but the effect of it is to transfer all the tolls of the Portsmouth Company, both for what is called the through traffic and what is called the local traffic, to the South-Western Company, they paying 18,000*l.* a year to the Portsmouth Company out of a joint fund constituted of their own tolls and of the tolls of the Portsmouth Company, to be received by them in priority to all charges on the joint fund; the London and South-Western Company thus not only taking all the tolls of the Portsmouth Company, but charging their own tolls with the payment of the 18,000*l.* a year.

Little was said at the bar in support of either of these agreements, but much reliance was placed on the third agreement, which is dated the 24th of February, 1859, after the filing of this bill. [His Lordship read the above-stated clauses of * 398 this agreement.] If this agreement stood * by itself, and was clearly confined to the traffic of the South-Western Company carried over the Portsmouth line, it might perhaps well be maintained upon the authority of the case which was referred to in support of it, the *South Yorkshire v. The Great Northern Railway Company*, and I give no opinion upon that point, but it seems to me that this was not a *bonâ fide* agreement — that it was a mere subterfuge for carrying into effect what had before been illegally agreed upon. It is to be observed that this agreement, when referring to the South-Western traffic, speaks of their traffic, and I am by no means satisfied that these words “their traffic” were not intended to include the traffic of the Portsmouth Rail-

way, treated as belonging to them under the previous agreements. If so, this last agreement must, as it seems to me, be vicious upon the same grounds as apply to the other agreements ; but if, on the other hand, the words "their traffic" were not meant to include, and do not include, the traffic of the Portsmouth Railway, then the defendants the South-Western Company, as they are undoubtedly carrying the traffic of the Portsmouth line, must be working under all the agreements, and not under the last agreement alone, and the three agreements constitute together but one agreement, and the case cannot fall within the 87th section of the Railway Act. In the argument on this part of the case, some reference was made to a local Act of the 1st Vict., and to the Portsmouth Railway Amendment Act, 1857, but it does not appear to me that the case of the defendants, the South-Western Company, is aided by either of these Acts. The former of them clearly does not extend to authorize the working of the traffic of the Portsmouth line, and the latter of them expressly provides that no agreement or arrangement made under it shall have any effect until approved by the Board of Trade, and no such approval has been given. It was much insisted upon on the part of the defendants the South-Western * Com- * 399 pany that the plaintiffs the Brighton Company could have no right to inquire whether the traffic which was carried by the South-Western Company was or was not lawfully carried by them ; but if the Act of 1847 gives no rights to the South-Western Company, except in respect of traffic lawfully carried, the right to have the question determined whether the traffic was lawfully carried or not seems to me to follow upon the construction of the Act. It was said that the plaintiffs the Brighton Company could not be entitled to stop the trains of the South-Western Company and inquire whence the passengers and goods had come, and whether they had lawfully come upon the South-Western line ; but this seems to me to be only a difficulty in working out the Act. No doubt there may be great difficulties in working it out, but it does not, I think, follow that because there may be cases in which it may be difficult, or perhaps impossible, to prove the infringement of the right, the Court ought to hold its hand where that infringement is established.

Another argument which was advanced on the part of the defendants the South-Western Company was this: that as they

had acquired by the award the right to bring their passengers and goods down to the joint line, it could not be said that their traffic was unlawful; but although the award may legalize the traffic so far as the passing over the Brighton line is concerned, it cannot, I think, legalize it in other respects, and render traffic carried under unlawful agreements a lawful traffic. Upon the whole, therefore, the conclusion at which I have arrived is, that the Act of 1847 does not give to the defendants the right contended for by them, and I think, therefore, that the injunction prayed by this bill as to the joint station is due; but I think it should be granted only until further order, with liberty to apply.

* 400 * In the view which I have taken of this case it has not been necessary to consider the effect of the agreements between the plaintiffs the Brighton Company and the defendants the South-Western Company, or the question whether the defendants the South-Western Company ought or ought not to be considered as a company lawfully using the Portsmouth Railway within the meaning of the Act of 1858, although I very much incline to agree with the opinion of the Vice-Chancellor and of the Lord Chancellor on that point. But with reference to the Act of 1858, it may be right to observe that, independently of the question whether the South-Western Company falls within its provisions, it seems to me to afford an argument of some importance in favour of the plaintiff's case. That Act proceeds upon the assumption that the Portsmouth Company were not then entitled either to the use of the joint line of railway or to bring their traffic into the joint station; and after enabling them to acquire the use of the joint line of railway, it positively excludes them from the joint station except by agreement with the owners of that station, — the South-Western and Brighton Companies, and provides that if no such agreement shall be come to within the time mentioned in the Act, they shall purchase land and build a station of their own. The legislature having thus empowered the Portsmouth Company to acquire the use of the joint station by agreement with the two companies, and having rendered it compulsory upon them to build a station of their own if no such agreement was come to, can hardly be taken to have supposed that they were already authorized to acquire the right to use the joint station by agreement with one of the companies. This observa-

tion, it may be true, applies to the Portsmouth Company and not to the South-Western Company; but then it is to be observed that, according to the terms of the Act, an agreement with one of the two companies the joint owners * of the * 401 joint station could not absolve the Portsmouth Company from building a station of their own; and if, notwithstanding such an agreement, they were bound to build their own station, it would seem that their traffic must, notwithstanding such an agreement, have been intended to be carried into that station and not into the joint station. Looking to the frame of this record, and the absence of the joint committee, I do not think we can direct the accounts prayed by this bill, and the decree, therefore, must be confined to the injunction. I think the South-Western Company must pay the plaintiffs' costs of the suit, and that there should be no costs to the Portsmouth Company.

WILDMAN v. LADE.

1859. June 8. Before the Lord Chancellor Lord CHELMSFORD.

An enrolment of a decree ought not to be vacated except on strong grounds of surprise, or in a case approaching deception or *mala fides*.¹

Where, therefore, some communications had passed between the solicitors with reference to an appeal, and on an application of the unsuccessful party to vacate the enrolment, his solicitor made an affidavit, but did not state that he had been misled, the application was refused.

THIS was a motion on behalf of the defendant to vacate an enrolment of a decree. The decree was pronounced on the 27th of April, 1859, and by it the defendant was ordered to specifically perform a contract to purchase a farm without an abatement in price, which was claimed by him.

The Registrar appointed the 7th of May to settle the minutes, and on the solicitor's attending the appointment, one of the defendant's solicitors informed the clerk of the plaintiff's solicitors that it was under consideration whether the decree

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1027.

* 402 should be appealed from, and he *proposed that the appointment should be adjourned, as in case the defendant determined not to appeal his solicitor would propose that the decree should be drawn up directing the purchase-money and interest (the amount of such interest to be settled and without any deduction for rent) to be paid by a certain day, so as to avoid the delay and expense of answering some inquiries directed by the decree as it was pronounced.

The appointment was accordingly adjourned to the 11th of May, the defendant's solicitor promising, in the mean time, to ascertain whether the defendant would appeal or not.

On the 9th of May the defendant's solicitor sent to the plaintiff's solicitor a letter, which commenced as follows: "*Lade ats. Wildman.* Our client will appeal against the decision of the Master of the Rolls." By the same letter it was stated that a Mr. Marten had offered to become tenant of the farm in question on certain terms, one term being that his rent should commence from September then last, and the defendant's solicitor asked whether the plaintiff's solicitors would consent, without prejudice to any question, that the farm should be let. The letter concluded as follows: "Whichever way the case is decided the above arrangement will be beneficial. An early reply will oblige."

On the 11th of May the clerk of the defendant's solicitor informed the clerk of the plaintiff's solicitors, and also the Registrar, that, as the defendant intended to appeal from the decree, it might be drawn up according to the usual form; and in conversation the clerk of the plaintiff's solicitors stated that he had received the letter of the 9th of May, and thought it fair that the land should be let, and would write when instructed.

* 403 The *minutes of the order were then settled, and an appointment made to pass the order on the 14th of May.

On the 21st of May the defendant's solicitors wrote to the plaintiff's solicitors the following letter of that date:

" LADE *ats.* WILDMAN.

" Dear Sirs, — We have been expecting to hear from you as to letting the land. Mr. Marten wrote the other day asking permission to take the land, but our client informed him that the matter rested with Mr. Wildman's solicitors, and cautioned him not to take possession without leave. This morning brought us

a letter from our client, enclosing one from Mr. Marten. Our clerk will show you Marten's letter. Our client has had nothing to do with Mr. Marten taking possession, and we suppose that it may have been arranged with your client. Do you know how the fact is? If you consent to the proposal contained in our former letter it is all well; but, if not, then you must deal with Mr. Marten, who has taken possession without leave, at all events from our client. A line by bearer will oblige."

On the same day the plaintiff's solicitors returned the following answer:—

" WILDMAN v. LADE.

" 21st May, 1859.

" Dear Sirs, — If Mr. Marten has taken possession of the land, he has done so without any sanction on the part of Mr. Wildman. Your letter of this morning is the only intimation we have received on the point. In the present state of the business we had rather not enter into an arrangement for the letting of the land."

In support of the application an affidavit of the defendant's * solicitor and his clerk was filed, stating to the above * 404 effect; and in opposition affidavits were filed, in one of which the plaintiff's solicitors' clerk deposed, that in the communications between the solicitors since the decree was pronounced, whether written or verbal, the plaintiff's solicitors were never asked to give any undertaking or promise whatever to stay any proceedings either for the completion, enrolment, or prosecution of the decree, except the above-mentioned adjournment of the appointment to settle minutes; and that nothing whatever was written or said regarding the enrolment of the decree until some days after the enrolment had been effected; and that the deponent (who had had the conduct of the matter) never gave any undertaking, or promise, or assurance of any kind, or wrote or said any thing to lead the defendant's solicitors to suppose that the decree would not be enrolled, or that the prosecution thereof would be in any manner whatsoever stayed for the hearing of an appeal.

The decree was passed on the 14th of May and was delivered out (after having been entered) on the 18th of May.

On the 20th of May inquiry was made by the plaintiff's solicitors whether a caveat had been entered, and there having been none, the docket for the enrolment of the decree was lodged with the proper officer, and the enrolment was effected on the 21st of May.

Mr. Jolliffe (with whom was *Mr. R. Palmer*) supported the motion.

Mr. Jessell (with whom was *Mr. Selwyn*) opposed it.

The following cases were referred to : *Williams v. * 405 * Page*, (a) *Barnes v. Wilson*, (b) *Stevens v. Guppy*, (c) *Pearce v. Lindsay*. (d)

THE LORD CHANCELLOR. — At first I thought that the defendant's solicitors might have been misled by not receiving an answer to the letter of the 9th of May until the day on which the decree was enrolled ; but, upon the whole evidence, I do not think that this was the case. And, indeed, the defendant's solicitor has left me in such a situation that I cannot consider him to have been misled, for he does not tell me in his affidavit that he was. An enrolment ought not to be vacated except upon strong grounds of surprise, or something approaching deception or *mala fides*.

Motion refused with costs.

(a) 1 De G. & J. 560.

(b) 1 Russ. & Myl. 486.

(c) T. & R. 178.

(d) *Ante*, p. 211.

* RABBETH v. SQUIRE.

* 406

1859. June 6, 8. Before the Lord Chancellor Lord CHELMSFORD.

A direction in a will that two of the testator's sons might have the use and occupation of part of the devised lands, paying a rent and some outgoings, but that in default of payment, or if they converted the marsh land into tillage, they should no longer have possession: *Held*, not to require personal use and occupation, but to permit the sons to let the land.¹

A testator gave real and personal estate to trustees in trust to pay the income of a fifth part to a daughter for life, and after her death to all her children equally, with similar trusts in favour of the testator's four other children and their children, with a proviso, that if any of the testator's said children should die without leaving any child living at his death, the part of such child should be held in trust for all the testator's other children for their lives and the issue of any of them that should be dead, as before directed; and when all his children should have died, then the whole property was to be in trust for all the children of the testator's children *per capita*: *Held*, that the income of the share of a child dying and leaving a child, who also died before the death of the testator's last surviving child, was undisposed of between the two last-mentioned deaths, and that the case was not one in which cross-remainders were implied.²

THIS was an appeal from the decision of the Master of the Rolls upon the construction of the will of Thomas Squire, as regarded the effect of two distinct dispositions in it, raising entirely different questions.

By the will, which was dated the 23d of November, 1803, the testator devised and bequeathed his real and personal estate, after his wife's decease, to trustees, upon trusts for his sons and daughters and their children, which were all similarly limited; the trust with respect to one daughter, named Sarah Hogben, and her children, on which one of the questions turned, being thus expressed:—

“ And as to the interest, rents, and proceeds of one other full equal undivided fifth part and share of my said real and personal estate, in trust for my daughter Sarah, the wife of John Hogben,

¹ See 1 Jarman Wills (3d Eng. ed.), 757; *Maclaren v. Stainton*, 27 L. J. Ch. 442; *Stone v. Parker*, 29 ib. 874; *Whittome v. Lamb*, 12 M. & W. 813.

² See 2 Jarman Wills (3d Eng. ed.), 513 *et seq.*

and her assigns, for and during the term of her natural life ; and from and after her decease then upon trust to pay the
* 407 same interest, dividends, * rents, and proceeds unto all and every of the child and children, both male and female, of my said daughter Sarah which she shall leave at the time of her decease, equally to be divided between them, share and share alike." After the limitations of all the fifth shares there was the following proviso : " Provided always, that in case either or any of my said children shall happen to die without leaving any child or children at the time of his, her, or their respective deaths, then I declare that the said Jacob Squire, my brother, and the said Robert Marsh, and the survivor of them and the heirs of such survivor, shall stand and be seized of such part and share of my said real and personal estate of such of my said child, or children so dying without issue as aforesaid, to the use and behoof of all and every other of my said children during the term of his, her, or their natural lives and the issue of either of them that shall be then dead, in manner as I have before directed, equally to be divided between them ; and from and immediately after the decease of my said five children, and when they shall be all dead, then I give, devise, and bequeath all my said real and personal estate and effects unto my said trustees and the survivor of them, his heirs, executors, and administrators, upon trust to pay the interest, dividends, rents, and proceeds thereof unto all and every the sons and daughters of my said five children lawfully begotten, in equal shares and proportions, share and share alike, and to their heirs, executors, administrators, and assigns for ever, without any regard to the proportion or number of children which any one of my said children may have, it being my will that all my said grandchildren shall share equally alike."

After some provisions as to advancement, the will contained the following proviso, on which the other question turned :
* 408 " Provided also, and it is my will, intention, * and express desire, that, after the decease of my said wife, my two sons Jacob and Lawrence shall, if it is their desire, have the joint use and occupation, or they may divide the same as they can agree, of all my marsh lands at New Church and Bonnington, now in my own occupation, during their joint natural

lives, and also that the survivor of them shall have the whole thereof during his natural life, and in case my said son Thomas shall survive and outlive my said sons Jacob and Lawrence, that he shall have the use and occupation of the same lands during his natural life; and if either of my said sons Jacob or Lawrence shall decline such use and occupation, then the other shall have the whole use and occupation thereof; they my said sons paying and allowing rent for the same, by half-yearly payments, whilst they may be respectively in such use and occupation, at and after the rate of 1*l*. per acre per annum, and also paying all manner of taxes and assessments for the same, and the sum of 3*s*. per acre per annum, for wall scots and waterings for the same lands, and in case the same shall exceed the sum of 3*s*. per acre per annum, the overplus of such scots and waterings as aforesaid shall be paid by my trustees out of my said estate; and I direct my said trustees to keep all the fences in good and tenantable repair and condition, and in case my said sons who may from time to time be in possession of my said lands shall fail or make default in payment of the said rent for three months after the same shall become due and payable, or shall plough, break up, or convert into tillage or arable land any of the said lands, then it is my will and desire that such son or sons shall no longer have possession of my said lands or any part thereof, and shall quit the same on the 11th day of October, then next following such breach in payment of the said rent after one month's notice and making default therein, or ploughing, breaking up, or converting such lands into tillage or arable * land; and such son or sons, from and * 409 after the said 11th day of October, shall not any longer use or occupy the said lands; and in order to enable my said sons Jacob and Lawrence to take and use the said lands, I direct that an appraisement and valuation shall be made to them or him who shall wish to use the said lands of all my stock of cattle, sheep, and lambs that I may have at the time of my decease by four indifferent persons, one to be chosen by each of my said sons, and the other two by my said brother Jacob and Robert Marsh; and for the amount of a moiety of such valuation, each of my said sons Jacob and Lawrence shall enter into a separate bond and give such other security as in their power to my trustees, for securing the repayment of each of their said moieties of such valuation, together with interest for the same at the rate of 4*l*.

per cent per annum, which interest is to be considered as part of my estate, and to be half-yearly paid and applied as before directed."

Another proviso, referred to as throwing light on the latter of the above, was as follows: —

"Also it is my will and particular desire that my said son Lawrence shall, after the decease of my said wife, have the use and occupation of all that my messuage or tenement with the appurtenances situate at the upper end of Fancy Street, otherwise Fenchurch Street, in Folkstone, aforesaid, now in my own occupation, for and during the term of his natural life, he paying all taxes and assessments for the same; and it is my desire that he may not pay any rent for the same, the trustees to keep the same messuage or tenement and premises in good and tenantable repair and condition during the term aforesaid; and in case my son Lawrence shall not choose to reside in the said messuage or tenement, then it is my will and desire that he may let or hire the same for his own use and benefit to any person or persons
* 410 whomsoever for the most money and * best rent that can be had or gotten for the same during the term aforesaid."

The testator died in February, 1810, and the widow in September, 1817.

The sons Jacob and Lawrence entered into possession of the marsh lands, and gave their bonds for the amount at which the valuation was made as directed by the will. They paid the rent of 1*l.* per acre to the trustees, which was much less than the value of the land.

In 1829 Lawrence let his portion of the lands, and in 1849 Jacob died, leaving children, whereupon Lawrence let the whole of the lands.

Sarah Hogben died in April, 1829, leaving Squire Hogben her only child, who died in 1852, before all the testator's children had died, having devised and bequeathed all his estate to some of the defendants.

The bill was filed by a trustee under the will of the testator Thomas Squire to have the rights of all parties under the will declared, and the questions were: —

Firstly. Whether the joint use and occupation of the land given to Jacob and Lawrence required personal use and occupation by them.

Secondly. Who was entitled to Sarah Hogben's share, and whether the representatives of Squire Hogben were entitled to enjoy the share till the period of distribution, or whether till that period it was divisible among the other children or was undisposed of.

* The Master of the Rolls held, that personal use and * 411 occupation by Jacob and Lawrence was not required, and that the income of Sarah Hogben's share, between the death of Squire Hogben and the period of distribution, was undisposed of.

The case is reported in the 19th volume of Mr. Beavan's Reports. (a)

Mr. Selwyn and Mr. Swanston, Jr., in support of the appeal. — Upon the question of personal use and occupation, they referred to *Rex v. Inhabitants of Easington*, (b) and *Whittome v. Lamb*, (c) and, upon the other question, they referred to *Vanderplank v. King*, (d) *Malcolm v. Martin*, (e) *Doe v. Webb*, (g) *Pearce v. Edmeades*, (h) *Clache's Case*. (i)

Mr. Lloyd, Mr. Follett, Mr. G. Simpson, Mr. Wickens, and Mr. W. D. Lewis, for the different respondents. — They referred to *Fillingham v. Bromley*, (k) and *Bull v. Sibbs*. (l)

Mr. R. Palmer and Mr. Busk, for the plaintiffs the trustees.

Mr. Swanston, Jr., replied.

* THE LORD CHANCELLOR. — This appeal raises two per- * 412 fectly distinct questions.

One is, whether personal occupation was a condition annexed to the gift to Jacob and Lawrence. If I could collect this to have been here the intention of the testator I should be bound to

(a) Pages 70, 77.

(b) 4 T. R. 177.

(c) 12 M. & W. 813.

(d) 3 Hare, 1.

(e) 3 Bro. C. C. 50.

(g) 1 Taunt. 234.

(h) 3 Y. & C. (Exch.) 246.

(i) Dyer, 330 b.

(k) Turn. & R. 536.

(l) 8 T. R. 327.

give effect to it. But if this is doubtful upon the will, I cannot upon mere speculation ascribe such an intention to the testator. Independently of the words relied upon, there is a clear equitable interest given to Jacob and Lawrence for their lives. The words are "shall have the joint use and occupation, or they may divide the same as they can agree, of all my marsh lands at Newchurch and Bonnington, now in my occupation, during their joint natural lives, and that also the survivor shall have the whole thereof during his natural life." If the clause had rested there, we do not want the authority of *Rex v. Inhabitants of Easington* (a) to tell us that it would give life estates which must be cut down or qualified, if they are to be so, by some other words sufficient to prevent the former from having their ordinary effect. Is there then any thing in the will sufficient for this purpose? It is said that it is impossible to give any force to the words "use and occupation" without ascribing to them this intention. I cannot agree with that argument. The words occur in other parts of the will, and although the testator's intention or expectation may have been such as is contended for on behalf of the appellant, I cannot find any condition expressed with sufficient clearness to give effect to it.

The optional words are relied upon. But the lands were subject to rent and taxes and other expenses, and the

* 413 * sons might not wish to be burdened with these payments.

The testator says: "If either of my said sons Jacob and Lawrence shall decline such use and occupation, the other shall have the whole use and occupation thereof." But there is no provision for the event of both the sons declining the use and occupation. And it is to be observed that there is no gift over except in the event of Thomas outliving Jacob and Lawrence, who are to have the benefit of the gift during their lives and the life of the survivor. The gift over is expressly made contingent upon the sons not paying the rent or converting the land into tillage or arable land, and I am asked to introduce another contingency, which the testator has not introduced, that of personal occupation. Why am I to infer an intention on the part of the testator which he might have expressed if it had existed? The testator says, that in case of either of the defaults, which he specifies, the son making such default should quit on the 11th of

(a) 8 T. R. 177.

October following such breach — “in payment of such rent,” or ploughing, breaking up, or converting into tillage or arable land,” specifying therefore again carefully what the breaches were on which the benefit was to cease.

It appears to me that the direction in question gave equitable interests to the sons for their lives, and that there was no condition annexed to them requiring personal occupation.

Upon the other question it has been contended, that Squire Hogben took an estate for the life of the survivor of the testator's children, in the share of which Sarah Hogben was tenant for life. This argument cannot, I think, be sustained. It has also been argued that cross-remainders must be implied in the event of a grandchild dying before the period of distribution.

But an *implication of cross-remainders is to be derived *414 from the expressions used by the testator and not from speculation or conjecture. In this case the testator has expressed the event in which such remainders should take effect, viz., on the death of a child without leaving a child living at his or her death. It is contended that it would be doing violence to the will in which a testator has expressed his intention in one event not to give effect to that intention in another event of a similar kind. But if the testator has omitted to provide for the other event, I cannot supply the omission. If I attempted to do so I should be speculating and making a will for the testator. *Vanderplank v. King* (a) appears to me quite consistent with the decision of the Master of the Rolls, which I think correct on both points.

Appeal dismissed with costs.

(a) 3 Hare, 1.

BARTLETT v. PHILLIPS.

1859. March 11, 23. June 2, 14. Before the LORDS JUSTICES.

The coal under parts of the glebe of a vicarage had, at different times since 1756, with the consent of the vicars for the time being, been gotten by the persons working adjoining collieries, and royalties had been paid to the vicars for the time being, the working being conducted solely by underground passages from the adjoining collieries without entering on the surface of the glebe. *Held*, that no presumption could be drawn from these facts that there had been any grant authorizing the vicars to open mines.

THIS was a special case, which, by leave of their lordships, came on before them for original hearing.

The plaintiff was the owner in fee of the advowson of the vicarage of Madeley. The defendant was the vicar; and he had, from the 19th of April, 1847, to the 7th of June, 1849, been the patron of the advowson. The manor of Madeley belonged * 415 to the priory of Wenlock from the * conquest till the dissolution of monasteries. The church of Madeley was appropriated to the priory in 1322. The first vicar of Madeley was appointed in 1834, by the Prior of Wenlock; and the vicarage was then endowed with a house and the small tithes, but it could not be discovered when or how it was endowed with glebe.

The glebe consisted of five distinct portions of small extent, lying in different parts of the parish, which was nearly coextensive with the manor. The parish abounded with coal, lying in ten different strata. The lords of the manor were entitled to the minerals under nearly the whole of the parish, except the glebe lands.

Coal was got by the Prior of Wenlock within the parish in 1322, but not out of any part of the glebe, nor near it, and it appeared that, in 1390, coal had been gotten out of the lands belonging to the manor. For the last century coals have been gotten in the parish to a large extent.

Owing to the small extent of the several portions of the glebe and the great depth at which the coal lay, it was impossible that the coal under the glebe should be worked at a profit by inde-

pendent mines, though opportunities sometimes occurred for getting it advantageously by underground workings from mines in the other parts of the parish. Such other mines had, for the last fifty years and more, been worked exclusively by a partnership called the Madeley Wood Company, under leases granted by the lords of the manor.

There was no evidence whether any mines under the glebe were worked before 1756; but in that year, and thence occasionally down to the present time, the lords of the manor and their lessees, with the consent of the * vicars for the time * 416 being, got coals from under parts of the glebe by means of underground workings from their own mines, and without disturbing the surface of the glebe. Royalties were paid to the vicars for the time being for the coals so got, and were retained by them for their own use. The payments between 1756 and 1831, so far as could be ascertained, were as follows: On 7th February, 1756, 12*l.* 13*s.* 9*d.* for coals got under specified closes. In 1769, 21*l.* for "coals gotten under the glebe." On 4th November, 1774, 16*l.* 19*s.* 4*d.*; and on 18th January, 1775, a like sum for coals got under specified closes. In 1775, 10*l.* 5*s.* for coals of a specified stratum from some part of the glebe. On 28th July, 1783, 25*l.* for coal of a specified stratum under specified closes. Several sums, amounting to about 40*l.*, at various times between 1786 and 1831, for minerals gotten under the glebe.

In 1837 the Madeley Wood Company paid to the then vicar 385*l.* 10*s.* for coals of a specified stratum gotten under specified closes, and 168*l.* for coals of another specified stratum under other specified closes. These coals were all got, as above-mentioned, by underground workings only.

In 1844, the present vicar demised the minerals under all the glebe to the Madeley Wood Company, with liberty to get them by means of underground workings from their mines in other lands without interfering with the surface of the glebe; and he received for royalties, in respect of the coals and ironstone gotten under this demise, sums amounting to more than 1600*l.*, which he claimed to be entitled to for his own benefit. The plaintiff insisted that these sums represented part of the inheritance of the vicarage and glebe lands, and a special case, stating the above facts, was presented for * obtaining the opinion of * 417 the Court upon the question, it being agreed on both sides

that no further evidence could be had, and that the above were the whole of the facts bearing upon the question.

Mr. Giffard and *Mr. Renshaw*, for the plaintiff, referred to *Bainbridge on Mines*, (a) *Knight v. Moseley*, (b) *Jefferson v. Bishop of Durham*, (c) *Herring v. Dean and Chapter of St. Paul's*, (d) and *Duke of Marlborough v. St. John*, (e) on the general law as to the rights of an incumbent, and contended that there was nothing to show that the incumbent had a right, in the present case, to open mines — that lateral workings would not constitute such an open mine as to give a subsequent incumbent right to go on working, and that there was nothing in the case from which it could be inferred that coals under the glebe had ever been lawfully worked.

Mr. Roundell Palmer and *Mr. Speed*, for the vicar. — The coals had been worked ever since 1756 or earlier, for the benefit of the vicar for the time being, and this has not been done surreptitiously, though it was done only by lateral working, and there is no evidence as to the time when such working was commenced. After such a long enjoyment, every presumption is to be made in favour of its legality, and there is nothing here to lead affirmatively to the inference that the working was not legal. Here the mines, though only worked laterally, were open before the present incumbency. Even if the glebe was given to the vicarage since the Restraining Acts, they might have been
 * 418 legally opened, * provided proper consents were given, and they may have been open at the time of the endowment, for it is proved that coal was worked within the manor before the endowment. Now when a mine has been lawfully opened, a person with only a limited interest may continue the working. *Saunders's Case*, (g) *Stoughton v. Legh*, (h) *Knight v. Moseley*, (b) *Huntley v. Russell*. (i) In *The Earl of Rutland's Case*, (k) it was decided that mines might be opened under a glebe after the passing of the disabling statute; and *Doe v.*

(a) Pages 62–69.

(b) Ambl. 176.

(c) 1 Bos. & Pul. 105.

(d) 3 Sw. 492.

(e) 5 De G. & Sm. 174.

(g) 5 Co. Rep. 12.

(h) 1 Taunt. 409.

(i) 13 Q. B. 572.

(k) 1 Lev. 107; 1 Sid. 152.

Collinge (a) assumes that they may, if the proper consents be given. The presumption of fact which we ask for here, viz., that the mines were opened either before the endowment, or with proper consent afterwards, or that there has been some grant conferring on the vicar the right to open mines, is consistent with the principles of all the cases on the subject. In *Gibson v. Clark*, (b) a grant of an advowson was presumed; in *Roe v. Ireland*, (c) the enfranchisement of a copyhold; and in *Masters v. Fletcher*, (d) a grant of small tithes. Every presumption consistent with the proved facts, is to be made in favour of a long enjoyment.

Mr. Renshaw, in reply.—The surface was never broken, therefore the enjoyment must be looked upon as having been secret. I do not dispute that if a vicar found mines lawfully open, he might go on working them, but I do not admit that he could resume the working of a mine which, after having been lawfully opened, had been abandoned before his * title accrued. No minerals were ever got from these * 419 lands before the restraining Act, and the restraining Act prohibits any alienation, except the alienations there mentioned. In order to raise a presumption that enjoyment is lawful, it is necessary to show either knowledge by the person against whom the presumption is to be made, or a notoriety of enjoyment from which such knowledge is to be inferred. *Cooper v. Barber*, (e) *Partridge v. Scott*. (g)

Judgment reserved.

June 14.

THE LORD JUSTICE KNIGHT BRUCE.—The glebe land belonging to the vicarage of Madeley, in Shropshire, contains veins of coal and ironstone. Portions of these have been worked for some years, to the profit of some late and the present vicars of that parish, under a license or demise from the vicar for the time being. The working, however, has been by the owners of neighbouring coal works, by means of lateral subterranean com-

(a) 7 C. B. 939.

(b) 1 Jac. & W. 159.

(c) 11 East. 280.

(d) 1 Younge, 25.

(e) 3 Taunt. 99.

(g) 3 M. & W. 220.

munications, so that no part of the surface of the glebe land has been broken, all the minerals raised from it having been brought to "bank" (if that is a correct phrase) on other lands. And the question for decision upon this special case is, whether the present vicar is, as between him and the patron, representing for this purpose his own rights, as well as those of future vicars, entitled absolutely to the benefit of the minerals raised in the present vicar's time, which depends on another, namely, whether the working has been lawful and rightful as between him and the inheritance, that is, as between him on one side, and

* 420 the * church and patron, and ordinary and future vicars, on the other,—a question to which the answer affirmative or negative must be afforded by the facts stated in the case. What then is the just inference from those facts? There does not appear to have been any raising or working of coal or ironstone, or any mining operation in or under any part of the glebe land earlier than the year 1756. The present vicar's claim is not supported by any grant, instrument, or documentary evidence, existing or proved to have existed, nor has any consent or acquiescence on the part of the present or any former patron, or the present or any former ordinary, been shown. If, indeed, the working had been patent, if the surface of the glebe land had been broken, it is possible that consent or acquiescence on the part of some former patron or former ordinary might have been presumed; but neither that nor any other ground appears for imputing knowledge or notice to any former patron or former ordinary. As between the vicar therefore for the time being on one side, and the church, the patron for the time being, and the ordinary for the time being, on the other, neither any coal nor any ironstone under the glebe land has, in my judgment, been lawfully, been rightfully, raised or worked. The questions in the case, must, I think, consequently be answered against the present vicar, except to the extent of the agreed sum laid out by him in substantial improvements, which the patron has properly consented to allow him.

THE LORD JUSTICE TURNER.—The question in this case is, whether the defendant the vicar is entitled to the moneys which have arisen, during his incumbency, from the produce of some mines under the glebe belonging to the vicarage. In order to

entitle himself to these moneys it is incumbent upon
* him to show either that these mines were opened before * 421
he became vicar, or that he was lawfully entitled to open
them. Now these mines appear by the case to have been worked
under the lease granted by the defendant in the year 1844, and
it cannot, I think, in the absence of proof, be assumed that they
had been opened before. Had they been so it might have been
necessary to consider whether it was not incumbent on the defend-
ant to show that they had been lawfully so opened; and I very
much incline to think that this would have been incumbent on
the defendant, for if a wrong act was done by a preceding vicar
I do not see how the defendant could be justified in continuing
the wrong. This point, however, does not seem to me to arise.
The fact of other mines having been opened in the glebe
does not, I think, affect the question whether these particular
mines had or had not been opened, further than as it may bear
upon the question of presumption to which I am about to ad-
vert. This case, therefore, depends, as it seems to me, wholly
upon the question whether the defendant was lawfully entitled
to open these mines. It was said, that we must presume that the
defendant was so entitled; but in all cases where a presumption
is to be made it must be considered what the presumption to be
made is, and under what circumstances it is required to be made.
Here the presumption which is necessary would be that the right
to open the mines was either annexed to the endowment of the
vicarage with the glebe, or was granted and secured to the vicar
for the time being by all proper and necessary parties; but both
these presumptions appear to me to be quite unreasonable and
inconsistent with the very nature of an endowment, for the
purpose of an endowment is to secure the fruits of the endow-
ment to the vicar in all times to come, but the effect of these pre-
sumptions would be to give the mines to whoever might
* happen to be vicar when the mines were opened and * 422
worked. I doubt, therefore, whether any such presumption
could be made under any circumstances, and certainly I do not
think the circumstances of this case could warrant us in making
it; for here there is no trace of any of the mines under the glebe
having been worked before the year 1756, and the workings since
that time have been underground workings, which are not shown
to have been, and cannot be presumed to have been, known to

the parties who were interested in questioning the vicar's claims.¹ I am of opinion, therefore, that the vicar is not entitled to the moneys, in question, and that those moneys, deducting the 400*l.* as to which there is no dispute, ought to be laid out for the permanent benefit and improvement of the vicarage.

HODGKINSON *v.* THE NATIONAL LIVE-STOCK INSURANCE COMPANY.

1859. June 14. Before the LORDS JUSTICES.

A bill filed by shareholders in a company against directors, alleged that the directors had purchased shares from the chairman, and that such purchase was a fraud upon the plaintiffs and the other shareholders, and not authorized by the constitution of the company or by the provisions of its deed of settlement, which, so far as it was set out in the bill, did not provide any remedy in such a case: *Held*, that the bill showed a good cause of suit, and a demurrer was overruled.

The bill also alleged, that certain shareholders had paid a call, but that the plaintiffs were ignorant of the names of such shareholders: *Held*, that it was not demurrable for not making any of them parties.²

THIS was the appeal of the defendants from the decision of the Master of the Rolls reported in the 26th volume of Mr. Beavan's Reports, (a) overruling a demurrer.

The plaintiffs were shareholders in a joint-stock company, and sued on behalf of themselves and all other shareholders except

(a) Page 478.

¹ See Washburn Easements (2d ed.), 128, 580; *Napier v. Bulwinkle*, 5 Rich. 311, 324.

² Where the object of the suit is to restrain the commission of acts which are *ultra vires*, or such that they cannot be confirmed by the members of a corporation, any one member may sue on behalf of himself and the other members to restrain them. *Lyde v. Eastern Bengal Railway Co.*, 36 Beav. 10; *Bloxam v. Metropolitan Railway Co.*, L. R. 3 Ch. Ap. 337; *Atwood v. Merryweather*, L. R. 5 Eq. 464, n. (3) V. C. W.; *Clinch v. Financial Corporation*, L. R. 5 Eq. 450; affirmed L. R. 4 Ch. Ap. 117; *Kernaghan v. Williams*, L. R. 6 Eq. 228; *Gray v. Lewis*, L. R. 8 Eq. 526. But it is not necessary he should adopt that form of suit, and he may sue in his own name. *Hoole v. Great Western Railway Co.*, L. R. 3 Ch. Ap. 262.

the defendants. The bill alleged, among other things, a purchase from Edward Johnstone, * one of the defendants, * 423 who had been the chairman of the company, by the other directors (who were also defendants) of 500 shares in the company, and the cancellation of other shares of Edward Johnstone and of the other directors, under the circumstances stated in the following paragraphs of the bill : —

“ 19. In the latter part of the year 1855, the defendant Edward Johnstone, who had paid the deposit on 500 shares of the 4000 shares for which he had subscribed the deed of settlement, was desirous of retiring from the said company, and in fraud of the plaintiffs and the other shareholders of the company, other than the defendants, the directors, agreed with the other defendants, his co-directors, that he should be exonerated from all liability in respect of the 4000 shares, for which he had subscribed the deed of settlement as aforesaid ; and that he should be deemed to be and should be made to appear as the holder of 560 shares in the said company, and upon which he had paid the deposit, and that the company out of its funds should purchase of the said defendant Edward Johnstone such 560 shares, and that he should transfer the same to the company or some nominee or trustee on its behalf, and that some provision should be made to indemnify him from the consequences of having subscribed the said deed of settlement for 4000 shares. The defendants the directors well knew at this time, as the facts were, that the expenses and losses of the company exceeded its income, and that the company had not succeeded in obtaining any return for its paid-up capital, and that the dividends theretofore paid to the shareholders had been paid out of the capital funds of the company.”

“ 21. The plaintiffs for the first time discovered, in the month of March, 1858, and as the fact was that the defendants, the directors, to carry into effect such * fraudulent arrange- * 424 ment, had, on the 3d day of December, 1855, with a view to relieve, as against the plaintiff and the other shareholders, and to their prejudice, the defendant Edward Johnstone, from all liability in respect of the 4000 shares for which he has subscribed the deed of settlement as aforesaid, passed a resolution dated that day.” [The minute of it was set out.] “ Such resolution was

passed and minute entered in the books of the company to mislead the plaintiffs and the other shareholders of the company other than the defendants the directors, and to make it appear that such check was drawn in the ordinary course of the business of the company. The draft for 280*l.* referred to in the said minutes of the company was a check upon the bankers of the company, drawn by the defendants the directors, or some of them, with the privity and concurrence of the others of the said defendants the directors, and was paid out of the funds of the company to, or received by, the said defendant Edward Johnstone."

"22. In or about the month of February, 1856, to carry into effect the said arrangement for the release of the said defendant Edward Johnstone, the defendants the directors agreed to, and in fraud of the plaintiffs and other shareholders did cancel 3500 shares of the company, being the residue of the 4000 shares for which the said defendant Edward Johnstone had subscribed the said deed of settlement as aforesaid, and the deposit whereon he had not paid; the defendants John Thomas Croft, James Furnell, Robert Garland, John Moss, Edmond Sheppard Symes, Thomas Vaughan, and Edward Lloyd, in fraud of the plaintiffs and the other shareholders, agreed to and did cancel the 1500 shares for which the said defendant John Thomas Croft had subscribed the said deed of settlement, but whereon he had not paid the
* 425 deposit as aforesaid; they also in like * manner cancelled the 1500 shares for which the defendant James Furnell had subscribed the said deed of settlement, but had not paid the said deposit upon; they also in like manner cancelled the 1500 shares for which the said defendant Robert Garland had subscribed the deed of settlement, whereon he had not paid the said deposit; they also in like manner cancelled the 500 shares for which the said defendant John Moss had subscribed the said deed of settlement, whereon he had not paid the said deposit; they also in like manner cancelled the 500 shares for which the defendant Edmond Sheppard Symes had subscribed the said deed of settlement, whereon he had not paid the said deposit; they also in like manner cancelled the 1500 shares for which the said defendant Thomas Vaughan had subscribed the said deed of settlement, and whereon he had not paid the said deposit; and they also in like manner cancelled the 500 shares for which the

said defendant Edward Lloyd had subscribed the said deed of settlement, and whereon he had not paid the said deposit."

" 28. The defendants (with the exception of the defendants Edward Johnstone and Edward Lloyd, who had retired from the office of directors of the company), thereupon, to frustrate any inquiry into the position of the company, determined upon and did, on the 27th day of March, 1858, make a call of 5s. upon each share on the capital of the company (omitting from such call the said cancelled shares of the defendants the directors), and made the same payable on or before the 28th day of April, 1858."

" 37. The defendants the directors held the extraordinary general meeting on the 4th day of May, 1858; but the plaintiffs, for the reasons aforesaid, did not pay up the said call of 5s. per share, and consequently, by the terms of the said deed, were disqualified from attending and * voting at such * 426 meeting. The plaintiffs are unable to discover whether any of the shareholders of the company other than the defendants the directors have paid the said call of 5s. per share, and if any of such other shareholders have in fact paid the said call, they are, for all the purposes of this suit, represented by the defendants the directors, and if any such there be they are known only to the defendants the directors, who have refused to give to the plaintiffs any information with reference thereto, although they have been requested so to do, and the said defendants ought to discover and set forth the names of such shareholders, if any such there be."

" 51. The cancellation by the said defendants the directors of the shares for which they severally subscribed the said deed of settlement was illegal and fraudulent and void as against the plaintiffs and the other shareholders in the said company, other than the defendants the directors."

" 52. The purchase by the defendants the directors on behalf of the company, and payment therefor out of the funds of the company, of the 560 shares in the said company of the defendant Edward Johnstone, was a fraud upon the plaintiffs and the other shareholders of the company, and was not authorized by the constitution thereof or by the provisions of the said deed of settlement; and the plaintiffs insist that the defendants the directors have, by their acts, and under the circumstances aforesaid, rendered themselves and are jointly liable to make good to and for

the benefit of the said company and the shareholders therein all sums of money paid or applied by the said defendants in or towards the payment for the said shares."

" 54. The defendants, the company, and the directors threaten and intend to order the forfeiture of the plaintiffs' shares in the said company, and to proceed at law or otherwise against them, to enforce payment of the said call of 5s. a share, unless restrained by the order and injunction of this Honorable Court."

The bill sought a declaration that the above proceedings were fraudulent and void, and an injunction to restrain the enforcement of a call and the forfeiture of the shares.

Mr. R. Palmer and Mr. W. W. Cooper, for the defendants. — They referred to the following authorities: *Foss v. Harbottle*, (a) *Mozley v. Alston*, (b) *Taylor v. Hughes*, (c) *Edwards v. Shrewsbury and Birmingham Railway Company*, (d) *Yetts v. Norfolk Railway Company*, (e) *Baily v. Birkenhead &c. Junction Railway Company*, (g) *Lund v. Blanshard*, (h) *Kent v. Jackson*, (i) *Macbride v. Lindsay*, (k) *Ex parte Morgan*, (l) *York and North Midland Railway Company v. Hudson*. (m)

Mr. Selwyn, Mr. T. H. Terrell, and Mr. Stiffe, for the plaintiffs, were not called upon.

THE LORD JUSTICE KNIGHT BRUCE. — This is a bill by principals against their agents seeking to be relieved against a fraud which, as the former contend, is sufficiently alleged in the bill to have been committed by the agents. Of course, if this description is accurate, a demurrer is out of the question. It was suggested that the alleged frauds are remediable in such a manner under the provisions of the deed of settlement as to exclude or destroy the remedy of the shareholders. It may be

(a) 2 Hare, 461.

(b) 1 Phil. 800.

(c) 2 Jo. & Lat. 24.

(d) 2 De G. & S. 537.

(i) 2 De G., M. & G. 49 [(Am. ed.), note (1)].

(k) 9 Hare, 574.

(l) 1 Mac. & G. 225.

(e) 8 De G. & S. 298.

(g) 12 Beav. 433.

(h) 4 Hare, 290.

(m) 16 Beav. 485.

that the deed of settlement contains such provisions ; but, as the deed is set out in the bill, it does not appear to contain any such clause. The Master of the Rolls thought the demurrer excluded by the 19th and 52d paragraphs of the bill, to which I will add the 21st, 28th, 37th, 51st, and 54th. It was conceded at the bar, and rightly conceded, that if the bill is sustainable against any of the defendants, it is sustainable against all ; but it was very properly suggested by *Mr. Cooper*, that if the bill is sustainable on the merits there are other persons who ought to be defendants here, and that those who have paid the call of 5s. per share ought to be represented. I am not satisfied that it is material for these persons to be before the Court ; I say so independently of the 37th paragraph ; but the 37th paragraph alleges ignorance on the plaintiff's part of the names of those persons, and states that they are known to the directors, who refuse to give information to the plaintiffs. If ignorance alleged by a plaintiff is of a fact which he is bound to know, he cannot probably suggest that effectually as an excuse, but here it is ignorance of a fact which he is not bound to know. The demurrer must stand overruled.

THE LORD JUSTICE TURNER.—It is quite unnecessary to go beyond the 52d paragraph of the bill, which is as follows : [His Lordship read it as set out above.]

As to the argument, that the directors derived authority under the general Act, I am not aware of any enactment * which authorizes directors to enter into transactions of * 429 this description, when they do not derive that authority under their own act or their deed of settlement.

Appeal dismissed.

SCHOLEFIELD v. TEMPLER.

1859. June 25. Before the Lord Chancellor Lord CAMPBELL and the LORDS JUSTICES.

A person, though innocent, cannot avail himself of an advantage obtained by the fraud of another, unless there is some consideration moving from himself.¹

A debtor and his surety persuaded the creditor to accept from the debtor a transfer of a mortgage, which the debtor knew to be imaginary, but which the surety, relying on the debtor's statement, believed to be a good security. Afterwards the creditor, at the request of the surety, who suggested to him that he was secured by the mortgage, released the surety. Some friends of the surety, on the faith of this release, lent him money to enable him to compound with his other creditors, which the creditor, at the time of giving the release, knew that they had refused to do, unless the release was given : *Held*, affirming the decision of the Vice-Chancellor, that the creditor was entitled to be restored to his rights against the surety.

Held, also, by the Vice-Chancellor, that the creditor was entitled to such relief only upon the terms of repaying to the surety's friends the sums lent by them, with the right of standing in their place against the surety; but, on appeal, the provisions in their favour were struck out, and the decree made simply without prejudice to their rights.

THIS was an appeal by the defendant Templer from a decree of Vice-Chancellor WOOD, restoring the plaintiff to his rights against Templer, as a surety for the defendant Bell.

On the 26th of November, 1850, Bell, and Templer as his surety, gave to the plaintiff two joint and several promissory notes for 500*l.* each, payable respectively at six and twelve months after date. On the 18th of February, 1851, Bell drew on Templer a bill of 'exchange for 600*l.*, of which the plaintiff became the holder. This bill was accepted by Templer for Bell's accommodation.

* 430 * Some time afterwards, when the sum secured by the bill became payable, the plaintiff pressed for payment.

Bell then stated to the plaintiff that he was entitled to the sum of 3100*l.*, lent to a gentleman, whom he named, on mortgage of

¹ See *Goddard v. Carlisle*, 9 Price, 169; *Bowen v. Evans*, 2 H. L. Cas. 250; *Russell v. Jackson*, 10 Hare, 212; *Topham v. Duke of Portland*, 1 De G., J. & S. 569, per TURNER, L. J.

an estate in Wales, and proposed to transfer it to the plaintiff as a security for the 1600*l.* which he owed him. Templer believing Bell's representations to be true, concurred with him in suggesting to the plaintiff that the mortgage would be a better security for the money than what he had. Excuses were given by Bell for not producing the mortgage and title-deeds, and ultimately, on the 13th of June, 1851, Bell executed a deed purporting to be a transfer to the plaintiff of the alleged mortgage for 3100*l.*, to secure the 1600*l.* with interest. Templer concurred in the whole of these proceedings, but there was no reason to doubt that he did so in perfect good faith, relying on Bell's representations.

In July, 1851, Templer being in difficulties, some of his friends and relations proposed to lend him money to enable him to compromise with his creditors, but refused to do so unless he was first released from his liability as a surety for Bell. Templer thereupon had an interview with the plaintiff, informed him that unless the proposed compromise was carried out, bankruptcy or insolvency would be the result, and suggested, that as the plaintiff had got the mortgage he might safely release him. The plaintiff assented, and wrote and gave to Templer this letter, dated the 24th of July, 1851: "Mr. Bell having arranged with me for the repayment of the 1600*l.* which I advanced to him, with lawful interest thereon, I beg to state for the satisfaction of your friends and relations as well as yourself, that I do not hold you in any way responsible to me for the above sum."

* Templer soon afterwards called on the plaintiff, and * 431 said that his friends were not satisfied with the letter, inasmuch as the securities were negotiable instruments and might be transferred to holders for value; upon which the plaintiff struck Templer's name out of the notes and bill, and added to his letter this postscript: "I have of course struck your name out of the securities."

On the faith of the letter and postscript, Templer's friends advanced him by way of loan 1000*l.*, to enable him to effect the compromise with his creditors.

Later in the year 1851, Bell absconded to America, and it came to light that all his representations about the mortgage were false, and that no such mortgage had ever existed.

For some time after this, Templer's circumstances continued embarrassed, and upon his becoming more prosperous, the plain-

tiff in May, 1857, filed his bill against Templer and Bell, praying that it might be declared that the plaintiff was induced to accept the pretended transfer of June, 1851, by the fraud of Bell, and that such transfer might be declared void, and that it might be declared that the plaintiff was induced to write the letter of July, 1851, and to erase Templer's name from the notes and bill, in consequence of the execution of the pretended transfer, and in the belief that such transfer was a valid security, and that notwithstanding such letter and erasure, the defendants were jointly and severally liable to pay to the plaintiff the amount due on the notes and bill, and for an account and payment accordingly.

Vice-Chancellor WOOD made a decree in the plaintiff's favour, (a) declaring that the plaintiff ought to be restored to his rights against Templer, as if the letter of July, * 432 * 1851, had not been written, and the erasure had not been made; "but subject to his making good as between himself and the persons advancing the same, the 1000*l.* in the pleadings mentioned for the purpose of relieving Templer from his liabilities, and repaying the amount of such advance, if any, now remaining unpaid by Templer, and with the right of standing in the place of any person so unpaid as against the defendant Templer," and an inquiry was directed whether any thing, and what, was due in respect of the 1000*l.*, and to whom and on what securities and under what circumstances. No costs were given.

Mr. W. M. James and *Mr. E. F. Smith*, for the plaintiff. — The substantial part of the decree is right. Fraud vitiates any transactions, and makes them void *in toto*. *Edwards v. M'Leay*, (b) *Rawlins v. Wickham*, (c) *Lovell v. Hicks*. (d) Here Bell was guilty of gross fraud; it was in consequence of the pretended transfer that Templer was released, and Templer, as no consideration moved from himself, cannot, though innocent, derive any benefit from that fraud. In fact Templer himself concurred in the representations by which the plaintiff was misled, and though he did so innocently, he must be treated for the purposes of this suit as guilty of fraudulent misrepresentations. *Rawlins v. Wickham*. The plaintiff ought to have his

(a) 1 Johns. 155.

(c) 3 De G. & J. 304.

(b) 2 Sw. 287.

(d) 2 Y. & C. 46, 487.

costs of the suit, and he ought, moreover, to be relieved from that part of the decree which makes him liable to Templer's friends. If they have any equity they must assert it in a separate proceeding. They gave no consideration to the plaintiff.

* *Mr. Rolt and Mr. Giffard*, for Templer. — Templer * 433 received no benefit from Bell's fraud, for the pretended transfer of mortgage, even had it been good, would not have released Templer. His release was a subsequent transaction; it was made, no doubt, under mistake, but it was a common mistake, so there is no equity. *Ex parte Wilson (a)* shows that the release cannot be set aside. Templer's friends paid their money in consequence of the release; they are purchasers of it for him, and the transaction cannot be set aside in their absence. At all events the decree ought not to be varied in the plaintiff's favour in that respect. The lapse of time since 1851, when the fraud was discovered, makes it impossible to replace Templer in his former position, and is a bar to relief. As to costs, the bill charges fraud, and that charge is now abandoned. On this ground the plaintiff cannot have costs.

Mr. W. M. James, in reply. — There was no privity between the plaintiff and Templer's friends, and they would not have been proper parties to this suit. If they have any equity against the plaintiff at all they must take their own proceedings to enforce it. The defendant cannot set up a *jus tertii*.

THE LORD CHANCELLOR. — I am of opinion that the decree of the Vice-Chancellor, so far as it holds the defendant Templer still liable, should be affirmed. I consider it to be an established principle that a person cannot avail himself of what has been obtained by the fraud of another, unless he not only is innocent of the fraud, but has given some valuable * con- * 434 sideration. In the present case a gross fraud was practised by Bell. He represented that he had a mortgage which could be assigned as a security, and he executed a deed purporting to transfer a mortgage which in fact did not exist. It is quite clear that the plaintiff must be taken to have given the letter of July,

(a) 11 Ves. 410.

1851, and erased Templer's name from the notes and bill, in the belief that he had a mortgage security for the money in respect of which Templer was a surety. The bill is filed against Templer as a surety, and the defence which he sets up is a release obtained through the fraud of Bell, a defence which, in my judgment, cannot be sustained. It is not alleged that any consideration moved from Templer himself, and as to the sum of 1000*l.* advanced by his friends, that sum was advanced to satisfy demands quite unconnected with the transaction to which this suit relates. It was urged that the plaintiff, by striking Templer's name out of the bill and notes, suspended Templer's remedy against Bell, and that it is now impossible to place the parties *in statu quo*.¹ But Templer, though not a party to the fraud, represented the mortgage as a good mortgage, and induced the plaintiff to erase his name on that ground, and he cannot be heard to complain of any result of an act done at his own request, and in consequence of a misrepresentation made, though innocently made, by himself. The case of *Ex parte Wilson*, (a) which was relied on by the appellant, is quite distinguishable; for there the creditor acted voluntarily, here the surety was an actor, and concurred in the representations on the faith of which the release was given.

I am further of opinion that, under the circumstances of this case, lapse of time is no bar to the relief sought. For some time after it was first discovered that Templer was liable
 * 435 to pay, he was in no condition to pay, and the * plaintiff cannot be looked upon as guilty of laches for not taking proceedings when they must have been fruitless. It was argued that, by the delay of the plaintiff, Templer has lost his remedy against Bell, but that remedy is imaginary, Bell having absconded and gone beyond the sea as soon as his frauds were discovered.

As regards the friends who advanced money to relieve Templer from liability, I do not see any such connection between that advance and the present transaction as to entitle the friends to such relief as has been given them in this suit to which they are not parties. In my judgment the decree ought in this respect

(a) 11 Ves. 410.

¹ See Kerr F. & M. (1st Am. ed.) 336, 436; *Oakes v. Turquand*, L. R. 2 H. L. 375.

to be varied by omitting the provisions in favour of the persons advancing the money, and substituting a declaration that the decree is to be without prejudice to their rights.

It was urged on behalf of the plaintiff, that the decree ought to be varied by giving him the costs of the suit. After some doubt, I have come to the conclusion that there is not sufficient reason for disturbing the decree in this respect. There was considerable indiscretion on the part of the plaintiff, and the amended bill contains an allegation which amounts to a charge of fraud and has not been proved. It is alleged that Templer "had no reason to believe" that the security existed. If he had not, and yet represented that it did exist, he was guilty of fraud; but no such case is proved against him. He incautiously believed Bell's statements, and made to the plaintiff a representation grounded upon them, but there is no reason for imputing fraud to him, or for doubting that he fully believed that representation to be true. I am of opinion, therefore, that no variation as to costs should be made in the decree.

The Lords Justices concurred.

* In the Matter of HOSKINS, a Lunatic, * 436
and

In the Matter of The TRUSTEE ACT, 1850.

1859. June 25. Before the LORDS JUSTICES.

On a petition for appointing new trustees of a will containing gifts to classes, an affidavit of the solicitor was received as sufficient evidence of the persons constituting the classes, without the production of baptismal and other certificates.

THIS was a petition for the appointment of new trustees of a will, and for a vesting order. The trusts were for various classes of children and remoter issue of persons named in the will.

Mr. Toulmin, for the petitioners, in answer to a question from the Court, stated that all the *cestuis que trust* were petitioners, and

added that he felt it his duty to call the attention of the Court to the fact that the allegations in the petition as to the persons constituting the different classes of *cestuis que trust* were not supported by the strict evidence of certificates and affidavits of identity, but only by an affidavit of the solicitor of the petitioners following the terms of the petition, and also stating how he acquired his knowledge of the facts.

Their Lordships held, that in a case of this nature such evidence might be treated as sufficient, and made the order.

* 437 * In the Matter of The JOINT-STOCK COMPANIES
WINDING-UP ACTS, 1848 and 1849,
and
In the Matter of The HOME COUNTIES AND GENERAL
LIFE ASSURANCE COMPANY.

WOOLLASTON'S CASE.

1859. June 29. Before the LORDS JUSTICES.

Dr. W. having agreed to become one of the medical referees of an insurance company, on the understanding that there would only be two of them, the secretary of the company called upon him, produced the deed of settlement, and induced him to execute it for 200 shares, representing that on his doing so he would be appointed one of the medical referees, of whom there would be only two; that the business would be equally divided between them; that the directors would not consent to his appointment unless he took 200 shares; and that all the office-bearers were required to take and had taken that number. Soon after this, Dr. W. discovered that four medical referees had been named. He thereupon claimed to be released from his shares, and demanded a return of his calls. He afterwards discovered that most of the office-bearers had never taken 200 shares. *Held*, affirming the decision of Vice-Chancellor KINDERSLEY, that, whatever breach of contract there might have been on the part of the company towards Dr. W., there was nothing in the above circumstances to entitle him to be discharged from his liabilities as a shareholder.¹

The deed of settlement provided, that if a shareholder should fail to pay a call for two months, the secretary should send him a notice requiring payment

¹ See *Elkinton's Case*, L. R. 2 Ch. Ap. 511.

within twenty-one days, and if the sum should not be paid within that time, the directors might declare the shares to be forfeited. Dr. W. and others having failed to pay for more than two months, the directors passed a resolution that notices should be sent to them requiring immediate payment, and that unless the calls were paid within twenty-one days the shares should be irremediably forfeited. A notice was accordingly sent to Dr. W., that if he did not pay his calls within twenty-one days, his shares would be irremediably forfeited. He did not pay. The company went on for three years, during which he was not treated as a shareholder, and did not claim to be one, though his name remained on the register. The company being wound up: *held*, that the declaration of forfeiture, though not strictly regular, complied substantially with the requisitions of the deed of settlement, and that Dr. W. was not a contributory.*

THIS was an appeal by Dr. Woollaston from an order of Vice-Chancellor KINDERSLEY, made on summons adjourned into Court, by which his Honor directed the name of Dr. Woollaston to be retained on the list of contributories.

The company was formed in 1853, under a deed of settlement dated the 30th of July in that year. The capital was divided into shares of 1*l.* each, payable by * two instal- * 438 ments of 10*s.* each, one payable at the time of the execution of the deed, the other at a future time to be named by the directors. The 100th clause provided for the payment of the second instalment, and the 101st was as follows:—

“ That in case any shareholder shall refuse or neglect to pay such further sum of 10*s.* per share or any part thereof as and when called for, in pursuance of the last preceding clause, with the interest (if any) payable thereon, and shall continue in such default for the space of two calendar months after the day appointed for the payment thereof, the secretary shall send to such shareholder a notice in writing, specifying the amount due and requiring payment thereof within twenty-one days from the date of such notice, on pain of forfeiture; and if such amount be not paid within the time so specified, it shall be lawful for the directors to declare the share or shares, in respect of which such sum and interest (if any) or any part thereof shall then remain unpaid, to be forfeited, and the same shall be forfeited accordingly to the use of the company.”

* See Knight's Case, L. R. 2 Ch. Ap. 322; Gower's Case, L. R. 6 Eq. 77.

The 103d clause provided that the company should be at liberty, if the directors should think fit, to sue for and compel payment of the sums for the non-payment whereof any share should have been forfeited, notwithstanding such forfeiture, and without prejudice thereto.

In January, 1854, one of the directors asked Dr. Woollaston to become one of the medical referees of the company, stating that there would be two, and that the whole medical business of the company would be equally divided between them. Shortly afterwards, on 28th January, the secretary repeated these assurances to Dr. Woollaston, and told him that the board of directors had nominated him as one of the medical referees. Dr.

* 439 Woollaston * signified his readiness to accept the office, and the secretary then produced the deed of settlement and asked him to execute it for 200 shares. Dr. Woollaston refused to do so, but, being told by the secretary that all the office-bearers were required to take and had taken shares, he executed the deed for ten shares.

On 30th January, 1854, a resolution was passed by the directors appointing Dr. Woollaston one of the medical referees, conditionally on his taking 200 shares. On the next day the secretary called on him and induced him to take ninety shares more; and on 9th February, 1854, again called, and told him that the directors would not consent to his appointment unless he took 200 shares; that all the office-bearers were required to take and had taken that number; that upon his taking them he would be appointed one of the medical referees, of whom there would be only two, and that all the medical business would be divided equally between him and the other referee. Dr. Woollaston thereupon took 100 more, and executed the deed in respect of them. He duly paid the first call on all his 200 shares.

Dr. Woollaston was employed on a few occasions, and attended on three board days. At his last attendance he was informed that he need not attend on board days, but he would be sent for if wanted; and he was never afterwards employed at all. On this occasion he discovered that four medical referees, instead of only two, were named in the printed prospectuses. Finding that the directors had ceased to employ him, he, on 8th August, 1854, tendered his resignation, and demanded the return of his 100l.

The company refused to refund, and on several occasions pressed for payment on the second call. Dr. Woollaston then placed the matter in the hands of his solicitor, who, on 14th October, 1854, wrote to the * company, repudiating the * 440 shares and demanding the return of the 100%. The company threatened proceedings to enforce payment of the call, but did not take any.

On the 9th of May, 1855, the following resolution was passed by the directors: "That those shareholders who have not fully paid and satisfied the respective calls upon their subscribed shares shall receive notice to do so forthwith, and that unless the said shares be fully paid and satisfied within twenty-one days from the date of the notice, then and in such case the said unpaid shares shall be irremediably forfeited to the sole and exclusive use of the company, under and by virtue of the 101st clause of the deed of settlement."

On the 5th of June, 1855, a copy of the above resolution was sent to Dr. Woollaston, along with the following notice, dated the 5th of June:—

"Sir, — In accordance with a resolution of the board of directors, passed on the 9th of May, 1855, I now beg to give you notice that unless the call of 100% on 200 shares subscribed for and held by you in this company be fully paid within twenty-one days from this date, then and in that case the said 200 shares will be irremediably forfeited to the sole and exclusive use of the company, and your interest in the same will finally cease. Annexed is a copy of the resolution. I am, Sir, &c."

Dr. Woollaston paid no attention to this notice, and no further communication passed between him and the company. The directors did not make any further declaration of forfeiture.

On 15th January, 1858, an order was made for winding up the company. In the proceedings under the * winding- * 441 up, it appeared that Dr. Woollaston's name had never been removed from the register of shareholders, nor had been included in any of the returns made under 7 & 8 Vict. c. 110, § 11, of the persons who had ceased to be shareholders. It appeared further, that of the thirteen persons who held office in the com-

pany at the time when Dr. Woollaston joined it, five only held 200 shares each.

The Vice-Chancellor held, that Dr. Woollaston was not entitled to be relieved from his liabilities as a shareholder on the ground that he had been induced to take shares by misrepresentation. His Honor also held the declaration of forfeiture to be invalid and ineffectual, and ordered Dr. Woollaston's name to be retained on the list of contributories.

Mr. Glasse and Mr. Brooksbank, for the appeal. — The secretary of the company, being a person who was authorized to carry about the deed and procure its execution, was in a position to bind the company by his representations. *National Exchange Company of Glasgow v. Drew*, (a) *Nicol's Case*. (b) Here, representations, most materially untrue, were made, and having been made by a person who had authority to make representations on the part of the company, the company cannot take the benefit of an execution obtained by his false representations. *Holt's Case*, (c) *Bell's Case*, (d) and *Ayre's Case* (e) show that such a case is distinguished from that of a representation made merely by an individual director. This case is stronger than *Brockwell's Case*, (g)

* 442 for there the representations were contained * only in a prospectus addressed to the public, here they were directly made to Dr. Woollaston personally. We admit that if we had bought in the market on the faith of the representations we could not succeed on this appeal, but the resolution of 30th January, 1854, was a direct authority to make the representation to Dr. Woollaston individually. *Duranty's Case*. (h) This case is like *Wood's Case*, (i) the shares having been taken conditionally, and the condition that he should be one of the two medical officers never having been fulfilled on the part of the company, Dr. Woollaston cannot be treated as a shareholder. In June, 1855, the directors declared Dr. Woollaston's shares forfeited, and never sued him for the call; they treated him as no longer a shareholder.

(a) 2 Macq. 103.

(b) *Supra*, vol. 3, p. 387.

(c) 22 Beav. 48.

(d) 22 Beav. 35.

(e) 27 L. J., N. S. 579, M. R.

(g) 4 Drew. 205.

(h) 28 L. J., N. S., Ch. 37, M. R.

(i) 3 De G. & J. 85.

[THE LORD JUSTICE KNIGHT BRUCE. — Is there any evidence that Dr. Woollaston assented to this forfeiture?]

The company went on for three years and he never claimed to be a shareholder, nor took any steps to recover his money, he therefore must be deemed to have acquiesced, though he never expressly signified his assent. But we contend that the forfeiture without his acquiescence was sufficient. The declaration of forfeiture, though not quite regular, was substantially sufficient. *Beresford's Case*. (a) There is in this case the acquiescence in the forfeiture, which was wanting in *Barton's Case*. (b) The act was within the powers of the directors, and informalities are unimportant. *Richmond's Executors' Case*, (c) *White's Case*. (d) There was here no collusion between the directors and Dr. Woollaston, nor was the forfeiture intended for his benefit, as in *Richmond's Case*, (e) but was declared *bond fide* as a penalty.

* THE LORD JUSTICE KNIGHT BRUCE. — My learned * 443 brother and I are agreed that the counsel for the official manager may confine their arguments to the question of forfeiture. The other ground taken in support of the appeal appears to us wholly untenable.

THE LORD JUSTICE TURNER. — The appellant accepted shares, was appointed a medical referee, and acted under that appointment. Whatever breach of contract there may have been on the part of the company, there is no reason for saying that he did not effectually become a shareholder.

Mr. W. D. Lewis and *Mr. J. Napier Higgins*, for the official manager. — The forfeiture was invalid, there not having been any declaration of forfeiture after the notices were sent. The 101st clause only empowers the directors to declare shares forfeited after the default has been made, and does not authorize their making a prospective declaration. This is a difference of substance, not of mere form; the directors were bound to exer-

(a) 3 De G. & Sm. 175; 2 Mac. & G. 197.

(b) *Supra*, p. 46.

(c) 3 De G. & Sm. 96.

(d) *Ibid.* 157.

(e) 4 K. & J. 305, 325.

cise a discretion after the twenty-one days' default, whether it was desirable or not to enforce the forfeiture. The notice was a mere preliminary step, which, not having been followed by a resolution of forfeiture, was ineffectual; the directors must be taken to have designedly abstained from declaring a forfeiture, — a view which is supported by the fact, that the name of the appellant has all along been retained on the register. We submit that the notice and resolutions did not import actual and complete forfeiture on default, but only amounted to a declaration what would be done in case of default. But, if they did,

* 444 we submit that there * still was no forfeiture, the 101st clause not authorizing a prospective declaration; moreover, the resolution is general, and on that ground alone could not be effectual, for it was the duty of the directors to exercise a discretion with respect to each particular case; they could not create an *ipso facto* forfeiture as to an unascertained class of shareholders, some of whom it might be better for the company to retain as shareholders than to release them by forfeiture. The register is evidence as to who are shareholders, and Dr. Woollaston's name is there; various persons took shares after the date of the alleged forfeiture, and may have taken them because they saw his name on the register. The provisions of the 7 & 8 Vict. c. 110, as to forfeiture, were not complied with.

Mr. Glasse, in reply. — A declaration of forfeiture could not be prejudicial to the company; as the company, notwithstanding a forfeiture, retained power under clause 103 to sue for the calls; the argument, therefore, that a forfeiture might prejudice the company, fails. That the directors did not remove the name of the appellant from the register cannot affect his position; it was a default of the officers of the company which he had no power to compel them to remedy, and of which the company cannot avail themselves against him. The argument, if sound at all, would establish that the most regular and formal forfeiture would be a nullity if the directors continued to return the name of the person as a shareholder. The resolution of May, 1855, it is true, was general, but the notice was particular, and it is indisputable that after twenty-one days' default a valid declaration of forfeiture might have been made. Now, the directors having

power to declare a valid forfeiture, and having intended * to * 445 declare a forfeiture, their omission to make a declaration after the default is a mere defect of form.

THE LORD JUSTICE KNIGHT BRUCE. — The directors in the events which occurred had power to declare a forfeiture of the shares in question. I think that they intended to exercise that power, and that in their manner of exercising it there was no excess nor any material deviation from the regular mode of proceeding. Forfeiture seems to have been intended, and seems to have been submitted to. On these grounds, respectfully differing from the Vice-Chancellor, though entirely agreeing with him on that part of the case which relates to misrepresentation, I am of opinion that the name of Dr. Woollaston ought to be removed from the list of contributories.

THE LORD JUSTICE TURNER. — I am of the same opinion. The clause, conferring the power of forfeiture is in these terms: [His Lordship read the 101st clause of the deed of settlement.] What the directors did was to send to Dr. Woollaston, not a notice requiring payment of the call within twenty-one days from the date of the notice on pain of forfeiture, but an absolute and unqualified notice, that if he did not pay within twenty-one days his shares would be irremediably forfeited to the sole and exclusive use of the company, and that his interest in the same would finally cease. By this notice they made a plain declaration of forfeiture, to take effect upon a certain event which happened, and for three years this declaration was treated as having taken effect and as being in force. It is argued that the 101st clause does not give the directors power to make such a prospective declaration of forfeiture, but only enables * them to declare * 446 a forfeiture after the shareholder has been in default for the twenty-one days, and that, in strictness, may be so, but this is a difference of form, not of substance. It is not as if the directors had made a prospective declaration of forfeiture as to a class of shareholders whose calls should afterwards fall into arrear; they were dealing with shareholders who were already in arrear, and it could not make any material difference in the exercise of their discretion as to forfeiture, whether they waited till the expiration of the twenty-one days from the notice before declaring it, or

declared it conditionally before sending the notice. The directors had power to declare a forfeiture in the events which happened: they clearly intended that there should be a forfeiture, and though their mode of declaring it may have been not strictly regular, the variation appears to me to be one of form and not of substance. I think, therefore, that this gentleman's name ought to be removed from the list of contributories.

* 447

* PAYNE v. MORTIMER.

1859. June 14, 15, 30. Before the LORDS JUSTICES.

The assignee for value of an equitable interest in the money payable under a voluntary bond, *held* entitled to rank as a specialty creditor for value against the assets of the obligor.¹

THIS was an appeal from an order of Vice-Chancellor STUART, allowing the respondents to rank as creditors for value, against the estate of Edward Horlock Mortimer, the testator in the cause.

On the 29th of September, 1842, the testator gave to three trustees a voluntary bond, conditioned for payment by his executors to the trustees of the sum of 28,600*l.* within six months after his death. The trusts of this sum were declared by the bond, and were, that the trustees should divide the sum in specified shares among his six children, giving to Thomas Richard Bythesea Mortimer 4350*l.*, to John Baskerville Mortimer 6000*l.*, &c.

T. R. B. Mortimer and J. B. Mortimer married in 1843, and each of them by an ante-nuptial settlement, to which his intended wife was a party, assigned his share of the moneys payable under the bond to trustees upon trusts, for the benefit of himself, his intended wife, and the issue of the marriage. The testator was privy to these settlements, but was not a party to either of them, and did not enter into any contract on the occasion of either marriage.

¹ See 1 Sugden V. & P. (8th Am. ed.) 381; 2 ib. 720, and note (g); Aldborough v. Trye, 7 Cl. & Fin. 463, 464; 2 Dart V. & P. (4th Eng. ed.) 823.

The testator died in 1857, and the present suit was instituted for the administration of his estate by certain trustees with whom he had entered into a covenant in contemplation of the marriage of one of his daughters. The trustees of the settlements of the two sons carried in a claim to rank as specialty creditors for value, in respect * of the shares of T. R. B. Mortimer * 448 and J. B. Mortimer in the moneys due on the bond. The chief clerk ranked them only as volunteers, but the Vice-Chancellor varied the certificate, and held them entitled to rank as specialty creditors for value. The assets being insufficient for the payment of creditors of that class, the plaintiffs appealed.

Mr. Malins and *Mr. Schomberg*, for the appellants. — The decision of the Vice-Chancellor is grounded upon *Prodgers v. Langham*, (a) *Kirk v. Clark*, (b) and *George v. Milbanke*. (c) But in those cases there was an assignment of specific property; the dealing for value was with a specific thing, which could be followed. A subsequent assignment for value may give the assignee a better title to a particular thing than his assignor had, but it cannot change the nature of a general obligation entered into by a third party. How can A.'s assigning for value to B. a voluntary bond given him by C., place the bond on a different footing as against C.'s estate. C. originally received no consideration for it, and nothing moves to him by the subsequent dealing. The cases of *Ashley v. Ashley*, (d) and *Meggison v. Foster*, (e) also relate only to dealings with specific property, and there is no authority for extending the principle of *George v. Milbanke* to general obligations, and *East India Company v. Clavell*, (g) is against the doing so. In *Tanner v. Byne*, (h) there was a subsequent dealing with the obligor, and that case therefore is not in point.

[The Lord Justice KNIGHT BRUCE referred to the observation * of Sir W. GRANT in *Daubeny v. Cockburn*; (i) * 449 *Croften v. Ormsby*, (k) and *Hart v. Middlehurst*, (l) were also referred to.]

(a) 1 Sid. 134.

(b) Prec. Ch. 275.

(c) 9 Ves. 190.

(d) 3 Sim. 149.

(e) 2 Y. & C. C. C. 336.

(g) Prec. Ch. 377.

(h) 1 Sim. 160.

(i) 1 Meriv. 638, 639.

(k) 2 Sch. & Lef. 583.

(l) 3 Atk. 377.

Mr. Bacon and *Mr. Freeling*, for the trustees of the settlement of T. R. B. Mortimer. — This case falls within the principle of *George v. Milbanke*, and the distinction taken by the appellants is unsubstantial. All the cases referred to by them were cases proceeding on the principle that a transaction originally voluntary may, by a subsequent dealing for value, even without the participation of the person from whom the bounty proceeds, be placed, as regards the person giving value, on the same footing as if he had been a party to the original transaction, and had given value then. These cases are recognized by the *dictum* of Lord COTTENHAM in *Skeeles v. Shearly*. (a) The principle, it is true, is in those cases applied only to dealings with specific property, but that is an accidental not a substantial difference. There is no reason why a subsequent consideration should not be imported into a bond as well as into a conveyance or an assignment.

Mr. Fooks, for other parties.

Mr. Schomberg, in reply.

Judgment reserved.

June 30.

THE LORD JUSTICE KNIGHT BRUCE. — In the year 1842, the late Mr. Mortimer, of whose assets in this case we have * 450 to dispose, entered into a * covenant for the payment of 5000*l.* after his death, for certain purposes. This, which was contained in his daughter's marriage settlement, was in contemplation and consideration of her marriage, that afterwards took place, I believe, in the same year. Mr. Mortimer died in the year 1857, and in that or the next year, the trustees of the covenant became immediate creditors on the assets for 5000*l.*, specialty creditors of course for value. It appears also, that in the year 1842, the year of the settlement and marriage of the daughter, but I believe after the marriage, Mr. Mortimer executed a voluntary bond for securing a large sum of money to be paid upon or soon after his death, for the benefit of some of his children. This was at the time, I repeat, supported by no valuable consideration, but the transaction is not proved to have been an

(a) 3 My. & Cr. 112, 120.

unfair one. The obligor certainly was bound by the bond, and it does not appear that when he executed it he was insolvent or contemplated insolvency, or expected or believed that he should die insolvent, though in fact he did more than fourteen years afterwards die insolvent. It is conceded that in this jurisdiction some portion of the bond debt must, on the ground of the absence of valuable consideration, be postponed to the covenant debt; but it appears that two of the sons beneficially interested under the bond did, in the testator's lifetime, assign their portions or parts of their portions of the bond debt on the occasion and in contemplation of the respective marriages of those two sons, and therefore for value. This happened in the year 1843; and for the interests in the voluntary bond debt thus assigned for valuable consideration, a claim is made to equal rank in equity against the assets with the covenant debt. Such is the dispute before us. Now clearly at law the covenant debt and the whole of the bond debt, being both specialty debts, stand on an equal footing. For no purpose of an action — for no purpose

* merely legal, is the bond wholly or partially less entitled * 451 to the payment, if I may so express myself, or of lower rank than the covenant, of which the original consideration was valuable. The controversy for priority is one arising and to be decided upon rules of equitable, as distinguished from those of legal, administration. And certainly the rules of equitable administration do sometimes make an important distinction between debts for value and debts incurred voluntarily, which, in all other respects, stand on the same footing. But the point for decision here is, whether a specialty debt, created voluntarily, but during the life of the debtor assigned for value by the creditor to a third person, the owner of it accordingly in equity at the time of the debtor's death, is obnoxious to the equitable rule of administration which prefers or generally prefers debts for value to debts for the same or a higher class not for value. I think that it is not, my opinion being that the difference between the present case and such a case as that of *George v. Milbanke* (on which Sir WILLIAM GRANT has observed particularly in *Daubeny v. Cockburn*), is a difference of accident merely and not essential. The principle, I think the rational and correct principle, on which *George v. Milbanke* was decided, applies, in my judgment, to the present dispute, and determines it. The fact that neither

of the debts in the present instance was payable in the debtor's lifetime is, I think, immaterial, nor do I consider the well-known principle or rule on which *Cator v. Burke* (a) and other decisions of that class proceeded, to have any application here in favour of the covenant debt. The dispute is only between general creditors of a deceased debtor, one saying that he ought to be paid out of the assets in preference to the other, which the other denies. But the debtor's estate is not concerned in the *452 matter, *since to its extent it is liable to pay the whole of each debt. *Primâ facie*, all specialty creditors of a deceased person stand equally as claimants against his assets. If one among them asserts a right in equity superior to the rest, a right incapable of assertion at law — a right which the law does not acknowledge, it is for him to establish it. This the covenant debtors have done, I conceive, with regard to the unassigned parts of the bond debt, but not with regard to the parts of it assigned for value. The circumstance, that in one instance the valuable consideration was by immediate contract with the debtor, and in the other not so, but by a contract in his lifetime with the equitable owners of parts of the debt originally voluntary — a contract made after the debt had been incurred, though it was not to be paid in the debtor's lifetime, being, in my judgment, for every present purpose immaterial. I concur, therefore, in the Vice-Chancellor's conclusion. It may be superfluous to add, that I lay no stress on any communication made by or to the obligor after the execution of the bond.

THE LORD JUSTICE TURNER. — This is a question whether a voluntary bond assigned for value ought, in the administration of assets, to stand upon the same footing as a bond originally given for value. The Vice-Chancellor Sir JOHN STUART has been of opinion that it ought, and I agree in that opinion. It was not denied on the part of the general creditors, on whose behalf the case was argued, that, in the absence of fraud, a voluntary assignment of personal estate is made good against creditors by a subsequent assignment of it for valuable consideration; but it was said that this was so only by the operation of the Statute of Elizabeth, preventing the author of the voluntary instrument from disputing the right of the alienee for value, and that the

(a) 1 Bro. C. C. 434.

* assignment for value could not change the nature of the * 453 original debt, and convert an obligation which was voluntary in its inception into an obligation for valuable consideration. Lord ELDON, however, in *George v. Milbanke*, did not put the case upon the Statute of Elizabeth. He had regard, no doubt, and indeed the report shows, although but obscurely, that he had regard, to the proviso in the statute which protects alienees for value only in the case of absence of notice, and he puts the case upon the ground of the assignee for value having a better equity than the general creditors of the settlor. That principle seems to me to reach the present case. The bond constitutes a good specialty debt at law against the obligor, and the question is, whether this Court is to cut it down against the alienee for value in favour of the general creditors. The case of *The East India Company v. Clavell*, which is found in the registrar's minute book under the title of *The East India Company v. Shepherd*, (a) was much relied on upon the part of the general creditors, as showing that Mr. Clavell, who in that case had become entitled by marriage to 5000*l.*, secured by a voluntary settlement, was postponed to the East India Company, who were bond creditors of the settlor; but the case, even as reported, has no application to the present, for the settlement, whether voluntary or not, was not held to be void against the creditors of the settlor, and could not be so held, the East India Company not being creditors at the date of it; and upon reference to the registrar's minute of the case, with a copy of which I have been favoured, it appears that the facts are not fully stated in the reports. One of the trusts of the term in that case was to raise 2000*l.* for payment of such debts as Sir Edward Littleton should appoint, and the bond appears to have been conditioned only for due management by Sir Edward Littleton during five years only. * The * 454 decree was for an account of the losses sustained by the company during the five years, and of what satisfaction the company had received; what they had received during the five years or afterwards was to go towards satisfying their losses, and what should be remaining due was to be satisfied out of Sir Edward's personal estate, and if the personal estate should be deficient, the deficiency, not exceeding 2000*l.*, was to be made good out of the moneys to be raised by sale of the term. A sale was directed of

(a) See note at the end of this case.

the fee. The Master was to estimate the difference between the value of the term and the value of the fee. That difference, together with the 2000*l.*, was ordered to be set apart to abide the result of the account; and the surplus of the moneys arising from the sale was ordered to be applied according to the decree in Mr. Clavell's suit, that is, in payment of the 5000*l.* If the company should appear to have received more than would satisfy their losses during the five years, the excess was to be applied to the general account between them and Sir E. Littleton, and any deficiency of such excess to answer what might be due on the general account was to be made good out of the residue of the personal estate not applied to the losses during the five years; and the question was reserved whether, if this residue of the personal estate should not be sufficient to answer what was due on the general account, the 1000 years' term ought not to be made liable to the satisfaction thereof, so far as any of the personal estate should be applied in respect of the 1000 years' term, towards satisfaction of the losses during the five years. The value of the inheritance was also to be subject to the company's satisfaction, so far as it should appear that they had any subsisting demand against Sir E. Littleton which could affect his inheritance. It is clear, therefore, that Mr. Clavell was not postponed to the company, except to the extent of the 2000*l.* secured

* 455 by the term for the payment of debts, and that * the case does not, either as reported or upon the more accurate statement in the registrar's minute book, furnish any authority in favour of the general creditors. This appeal must consequently be dismissed, and with costs.

NOTE. — The following are the material parts of the entry in the registrar's minute book :—

EAST INDIA COMPANY v. SHEPHERD.

Mr. Jekyll, for East India Company. — We employed Sir Edward Littleton as our president at Bengall. He gave security by Sir Strensham Masters and Shepherd, and before he went he made a voluntary settlement on trust of his reall estate, first for payment of 180*l.* per annum to his wife, 100*l.* per annum for mainteynance of his daughter, and with raiseing 5000*l.* for the education of his daughter, and 2000*l.* for payment of such debts as he should appoint. That Sir Edward Littleton afterwards wasted our effects and became indebted to the company above 26,000*l.*, and being dead they now set up this settlement

to prevent our satisfaction out of his estate. Insist this settlement is fraudulent as against us who are creditors, and by the bond and articles he covenants for himself and his heirs.

Mr. J. Hooper, for East India Company. — The articles dated 16th January, 1698, read. The bond dated 16th January, 1698, read. A note signed Edward Littleton, dated the 30th April, 1701. The bond signed Edward Littleton, dated 12th August, 1704, read.

Mr. Attorney-General, for Masters and Shepherd. — We are by our bond responsible only for mismanagement during five years.

Sir Peter King, for defendant Clavell. — We married on the trust and confidence of this settlement, and cannot be looked upon as fraudulent against us.

Vernon, for defendant Clavell. — The settlement dated 21st January, 1698, read.

White examined *vivâ voce*, proved a letter dated February, 1706, to be Sir Edward Littleton's handwriting. The letter dated February, 1706, read.

CUR. — Let the Master take an account and see whether the East India Company be damnified, and how much, by reason of Sir Edward * Lit- * 456 tleton not performing any the covenants and agreement in the articles of 16th of January, 1698, within five years after his arrivall in India, and for that purpose y^e Master is to enquire when he arrived in India.

If the Master shall find the company was damnified by reason of Sir Edward Littleton not performing the covenants and agreement in the articles within y^e five years, then the Master is to see whether the company has received any and what satisfaction for y^e same from Sir Edward Littleton, by reason of any payments or disbursements made by y^e said Sir Edward unto or for y^e use of y^e said company or otherwise howsoever; and the East India Company are to account before the Master for what effects of Sir Edward Littleton are come to their hands, for discovery whereof their agents are to be examined on interrogatories, and produce all the company's books and papers of account relating thereto, and also all books, papers, and accounts which the company have of the said Sir Edward Littleton, upon oath. What effects of Sir Edward shall appear to have come to the company's hands, whether during the said five years or since, the same are to go towards satisfying the company what they were so damnified within the said five years.

What shall be remaining due to the company upon the balance of that account, let the same be satisfied out of the personall estate of Sir Edward Littleton, so far as the same will extend, for which purpose let the defendants Dawes and Maidstone and all other partyes who have possest any part of the personall effects account for the same before the Master, for discovery whereof they are to be examined upon interrogatories and produce all books and papers of account relating thereto upon oath before the Master, and have all just allowances.

If the personal estate shall not be sufficient to satisfy the company the ballance of the said account, such deficiency, not exceeding the sum of 2000*l.*, is to be made good to the company out of the moneys which shall be raised by sale of the 1000 years' terme in the first place; and to that end the trustees are to proceed to make sale of the trust estate to the best purchaser that can be got for the same, to be approved by the Master; in which sale the defendant the heir-at-law of Sir Edward Littleton, and all other parties are to join as the Master shall direct, who is to settle the conveyance to the purchaser. And the money arising by such sale is to be brought before the Master, who is to put an estimate upon the value of the inheritance of the trust estate after the 1000 years' term.

Lett 2000*l.* out of the money arising by the sale, and also what the Master shall estimate to be the value of the inheritance, be put out
 * 457 * by the Master on security, subject to wait the event of the account; and let the Master pay the surplus money arising by sale according to the decree made in Mr. Clavell's cause. (a) When the company shall have received such satisfaction of the ballance of the said account, let y^e bond be brought before the Master to be cancelled, and deliver up the articles to the heir of the said Sir Edward Littleton.

If upon the account it shall appear that the effects of Sir Edward Littleton come to the company's hands during the five years, or after the expiration of y^e five years, are more than will satisfy what the said company was damaged within the five years and remain unsatisfied to them for such damage, the surplus is to be subject to the company's other demands, for which purpose a general account is to be taken between the company and Sir Edward Littleton, but distinct from the account of damages, and all books, &c., are to be produced. If upon such general charges Sir Edward Littleton shall appear to be indebted to the company more than the value of his effects come to the company's hands which are so liable to satisfy the same, y^e residue of the personal estate of y^e said Sir Edward Littleton, above such part thereof as shall be applied towards satisfaction for the breach of covenants of the said Sir Edward Littleton during the said five years as aforesaid, shall be applied, as far as by the due course of administration the same shall be liable thereto, towards the satisfaction thereof; and if the personal estate shall not be sufficient, then reserve y^e consideration of whether y^e 1000 years' term shall not be made liable to y^e satisfaction thereof, so far as any of the personal estate shall be applied in respect of y^e 1000 years' terme towards satisfaction of the breach of covenants during five years as aforesaid. And the value of the inheritance is also to be subject to the company's satisfaction, so far as it shall appear to y^e Master the company has any subsisting demand against the said Sir Edward Littleton which could affect his inheritance. If upon taking the several accounts any difficulty shall arise, the Master is to state y^e same specially. If upon the account the company shall appear to be indebted to the said Sir Edward Littleton, decree the company to pay the same. The consideration of interest from the time y^e company's bill was filed, and also

(a) A cause of *Clavell v. Littleton*, in which Mr. Clavell had obtained a decree for raising the 5000*l.*

of the costs of these suits, and likewise all further directions in the cross cause to be reserved till after the Master's report; and in the mean tyme the injunction formerly granted is to be continued for stay of y^e company's proceedings on their bond; and also for stay of the proceedyngs on the counter-bond against the heirs and executors of Sir Edward Littleton. This decree is to bind the infant unless cause within six months after he come of age, and refer it to the same Master to whom y^e matter in Clavell's cause stands referred.

* NELSON v. STOCKER.

* 458

1859. May 31. June 30. Before the LORDS JUSTICES.

A young man of the age of seventeen, previous to his marriage with a woman possessed of personal property, executed a marriage settlement, by which he covenanted to pay 1000*l.* to the trustee. Before executing it, being asked by the solicitor of the intended wife whether he was of age, he said he believed he was. The intended wife, however, knew that he was not. After the marriage he received the wife's personal estate, and after her death refused to pay the 1000*l.* *Held*, reversing the decision of the Court below, that, as the wife was not misled by the misrepresentation, the settlement was not binding upon the husband when he came of age.¹

THIS was an appeal by the defendant W. B. Stocker from a decree of Vice-Chancellor STUART.

The bill was filed by the infant children of Anne Perkins Stocker, the issue of her marriage with her first husband John Henry Nelson, and by Henry Wise, a newly appointed trustee of the settlement made upon the marriage of Anne Perkins Stocker, with her second husband the defendant Wm. B. Stocker, and it was filed for the purpose of compelling the payment by the defendant Wm. B. Stocker to the plaintiff H. Wise of the sum of 1000*l.*, to be held by him upon the trusts of the settlement.

By the settlement, which was dated the 10th of October, 1850, the defendant Wm. B. Stocker covenanted with Ebenezer Vaughan Jenkins, and also with the trustee or trustees for the time being of the settlement, that, in case the marriage should be solemnized, he would pay to E. V. Jenkins, or other the trustee

¹ See *Vigers v. Pike*, 8 Cl. & Fin. (Am. ed.) 650, and note (1); *Lord Brooke v. Roundthwaite*, 5 Hare, 298, 306; *Kerr F. & M.* (1st Am. ed.) 75 *et seq.*; *Jennings v. Broughton*, 5 De G., M. & G. 126, and note (1).

or trustees thereof, the sum of 1000*l.*, but it was provided that the trustee or trustees should not, during the life of Anne P. Stocker, compel payment of the 1000*l.* until the decease of the defendant, unless required so to do by the said Anne P. Stocker by writing under her hand ; and it was declared and agreed that the 1000*l.* should be held upon trusts for the separate use of Anne P. Stocker during the joint lives of herself and the defendant Wm. B. Stocker, and if she should survive him, upon trust for her absolutely ; but if she should die in his lifetime, upon

* 459 trusts which, so far * as it is material to refer to them, were for the benefit of the plaintiffs the children of the first marriage. E. V. Jenkins never accepted the trusts of the settlement, and in the month of March, 1857, the plaintiff H. Wise was appointed by Mrs. Stocker, under a power in the settlement, to be trustee in his place. The marriage between the defendant Wm. B. Stocker and Anne P. Stocker was solemnized on the 13th of October, 1850, and in the month of August, 1857, Anne P. Stocker died.

The bill alleging these facts alleged also that, at the date of the settlement and at the time of the marriage, Anne P. Stocker carried on the business of a pawnbroker and was possessed of and employed in that business a capital of upwards of 1000*l.* That immediately upon the marriage the defendant Wm. B. Stocker took possession of his wife's capital and stock in trade, and that he had ever since carried on her business of a pawnbroker. That the defendant Wm. B. Stocker was, at the execution of the settlement and at the time of the marriage, of full age, and that he then represented himself to Anne P. Stocker to be of full age, and that on the faith of such representation to the said Anne P. Stocker the marriage was solemnized, the settlement executed and the capital and stock of Anne P. Stocker were delivered over to and taken possession of by the defendant Wm. B. Stocker. Under these circumstances the payment of the 1000*l.* was demanded by the bill.

The defendant resisted payment on the ground that he was a minor, in the eighteenth year of his age, when the settlement was executed, and was therefore not bound by it. It was clearly proved that he was in fact born on the 29th of November, 1832.

* 460 It appeared that he had * been engaged by Mrs. Stocker as an assistant in her business in June, 1850, she being thirty-

two years of age at the time. Previously to his executing the settlement Mrs. Stocker's solicitor asked him whether he was of age, to which he replied he believed he was, and in the entry in the marriage register he was described as of full age. Their lordships, however, were satisfied, upon the evidence, that Mrs. Stocker at the time of the marriage was aware that he was a minor. The Vice-Chancellor made a decree for payment by Stocker of the 1000*l.*, holding that his representation to the solicitor was a fraudulent misrepresentation, and that he was therefore bound to make it good.

Mr. Malins and *Mr. W. W. Mackeson*, for the plaintiff. — An infant cannot take advantage of his own fraud: *Stikeman v. Dawson*, (a) *Ex parte Unity Bank, Re King*; (b) but the Court will, so far as it can, restore the parties to their original situation. *Clarke v. Cobley*, (c) *Wright v. Snowe*, (d) *Overton v. Bannister*. (e) The *cestui que trust* and trustee may elect to proceed at law for damages, or in equity for specific performance. *Vernon v. Vernon*. (g) The representation made in this case was fraudulent, so as to entitle us to relief on the ground of fraud. *Watts v. Cresswell*, (h) *Cory v. Gertcken*, (i) *Esron v. Nicholas*. (k) The contract by marriage and settlement is entire, and the defendant having taken the benefit of one part cannot repudiate the other part. *Barrow v. Barrow*. (l)

* *Mr. Elmsley*, *Mr. Smythies*, and *Mr. Pemberton*, for * 461 the defendant. — The decree cannot be supported on the allegations of the bill or on the evidence. The judgment rests on two grounds, — misrepresentation and confirmation. The bill is not framed to raise the case of misrepresentation; it alleges that he was of age; the covenant is with the trustee for the time being; on the face of the bill the remedy is at law. As to misrepresentation two statements are relied on, — the statement to the solicitor and the statement to the clerk who made the entry in the register. The latter may be put out of the case, for the

(a) 1 De G. & Sm. 90.

(b) 3 De G. & J. 63.

(c) 2 Cox, 173.

(d) 2 De G. & Sm. 321.

(e) 3 Hare, 503.

(g) 2 P. Wms. 594.

(h) 9 Vin. Abr. 415.

(i) 2 Madd. 40.

(k) 1 De G. & Sm. 118.

(l) 4 K. & J. 409, 423.

whole transaction was complete then. As to the statement to the solicitor, it was not positive, the defendant only said he thought he was of age. Now, it must require a case of gross fraud to deprive an infant of the privilege of infancy; to entitle a person to relief on the ground of misrepresentation, the person complaining must have been misled; here the evidence shows that Mrs. Stocker knew the defendant was a minor; *Stikeman v. Dawson*. (a) Now as to confirmation, there was none, the defendant never assented to the settlement after he came of age. Even if he had, it would not have availed, for confirmation can only set up a voidable contract; (b) but the contracts of infants, if made to their prejudice, are absolutely void. *Baylis v. Dineley*. (c) The contract was not indivisible; the marriage contract was a personal one, into which an infant could effectually enter; the settlement was a contract relating to property, into which he could not enter. There could not, under 9 Geo. 4, c. 14, be any confirmation except in writing.

Furnival v. Coombs, (d) 8 & 9 Vict. c. 106, § 5, *Campbell v. Ingilby*, (e) *Lance v. Norman*, (g) *Countess of Strathmore v. Bowes*, (h) were also referred to.

Mr. Malins, in reply.

Judgment reserved.

June 30.

THE LORD JUSTICE KNIGHT BRUCE. — It being established in this cause that the defendant did not attain majority before the latter part of the year 1853, he is *prima facie* not bound by the instrument of settlement signed and sealed by him in the year 1850 (the year of his marriage), which it is the object of the suit to enforce against him. The plaintiffs, however, say that the defendant is bound by the instrument, because, as the plaintiffs contend, the defendant, with knowledge of his true age, misrepresented his age to his now deceased wife, and caused her, when the settlement was agreed upon, when it was prepared and

(a) 1 De G. & Sm. 108.

(b) Co. Litt. 295 b.

(c) 3 M. & Sel. 477.

(d) 7 Jur. 399.

(e) 21 Beav. 567; 1 De G. & J. 393.

(g) 2 Ch. Rep. 41.

(h) 2 Bro. C. C. 345.

signed, and when they married, to believe him not on any of those occasions to be a minor. The plaintiffs say that she accepted the settlement in that faith, and married in that belief, — a faith and belief induced, they assert, by the defendant's fraud. The plaintiffs also say that, independently of any question of fraud before the marriage, the defendant's conduct after the marriage, and especially after his majority, amounted to a confirmation by him of the settlement, and that on both grounds, or one of them, he is barred from denying his liability to make it good. It appears to me, however, upon the whole of the evidence, that the defendant's deceased wife is not shown

* to have been defrauded or deceived by the defendant in * 463 any respect before their marriage. I believe that at the time of the marriage and previously to it — I believe that before the instrument of settlement in question was signed by either of them, and before it was prepared — she was aware of his minority, and that the case stands substantially on the same footing, so far as the parties to the present record are concerned, as if the fact of his infancy had been stated on the face of the settlement. Then with regard to confirmation. Independently of the difficulty placed perhaps in the plaintiffs' way by Lord Tenterden's Act, as well as the nature of the document which they seek to enforce against the defendant, I conceive that the plaintiffs' claim in this respect, whether excluded or not excluded by the mode in which the bill is framed, fails on the evidence. I think that there is no confirmation, no agreement to confirm, nor conduct tantamount, proved. The rights of the defendant seem to me to remain as they did on the day after his marriage. I am of opinion, therefore, that the bill is without foundation, but that it is not a case for costs. With reference to the order which by consent or without opposition was made in April last (after the decree), and to the money brought into Court under that order, I think that the defendant consenting and the plaintiffs not objecting, an inquiry may take place in Chambers, to whom it belonged of right beneficially when brought into Court, and now belongs. If each party shall indeed be desirous to have the matter investigated here, I shall have no objection.

The Lord Justice TURNER, after stating the case made by the bill, proceeded as follows : —

The evidence in the cause seems to me to establish * 464 beyond all doubt that, at the date of the settlement and * at the time of the marriage, the defendant W. B. Stocker was only between seventeen and eighteen years of age, and Anne Perkins Stocker was a widow of the age of thirty-two, and, as I read the evidence, it further establishes in favour of the plaintiff, that the defendant William B. Stocker, before he executed the settlement, was asked by the solicitor who prepared it, whether he was of age, and replied that he thought that he was, and, in favour of the defendant, that Anne P. Stocker herself knew before the marriage that the defendant William B. Stocker was not of age. This, in my judgment, is the true result of the evidence in the cause, and it is upon these facts the Vice-Chancellor Sir J. STUART has decreed the payment of the 1000*l*. The defendant has appealed from the decree. In the course of the argument upon the appeal some question was raised as to the case being one in which the proper remedy was by an action at law upon the covenant; but, upon consideration, I think that the bill sufficiently alleges a case of fraud on the part of the defendant, and that the case therefore is one in which there must be at least a concurrent jurisdiction in equity. If the case had depended simply upon the point of the defendant having represented himself to be of age when he was not of age, I should have felt no doubt about it.¹ It is too much to call upon the Court to believe that this defendant could really have thought himself to be of age at the date of the settlement, when he was under eighteen years of age; and, if he did not so think, the representation he made to the solicitor was false and fraudulent. Infants are no more entitled than adults are to gain benefits to themselves by fraud,² and, had the case therefore depended upon this point alone,

¹ An infant who has represented himself to be of full age, and thus procured credit, is not estopped by such representation from setting up his infancy in avoidance of his contract at law: *Burley v. Russell*, 10 N. H. 184; *Merriam v. Cunningham*, 11 Cush. 40; *Stoolfoos v. Jenkins*, 12 Serg. & R. 309; *Conroe v. Birdsall*, 1 John. Cas. 127; *Brown v. McCune*, 5 Sandf. 224; *Badger v. Phinney*, 15 Mass. 359; though he may be bound in equity: *Kerr F. & M.* (1st Am. ed.) 148; *Cory v. Gertcken*, 2 Madd. 40; *Wright v. Snowe*, 2 De G. & Sm. 321.

² See *Kerr F. & M.* (1st Am. ed.) 148, and cases in notes. An infant is liable for fraud or tort which is entirely independent of contract. *Fitts v. Hall*, 9 N. H. 441; *Prescott v. Norris*, 32 N. H. 101; *Humphrey v. Douglas*,

I should have agreed most fully with the decision of the Vice-Chancellor. It is not, however, upon the question of false representation alone that the decision of this case, in my judgment, depends. It is scarcely less difficult * to believe * 465 that Anne P. Stocker did not know that the defendant was under age at the time of the settlement and of the marriage, than that the defendant himself did not know it. In fact, the evidence proves that she knew it. The true question, therefore, seems to me to be, not whether the representation made by the defendant was false, but whether a false representation made to a person who knows it to be false can be said to be a fraud, and such a fraud as will take away the privilege of infancy. There can be no doubt that it is morally wrong in an infant of competent age, as it is in any other person, to make any false representation whatever ; but this Court cannot enforce the observance of obligations or duties which rest only upon moral grounds. Some wrong or injury to the party complaining must be shown in order to call the Court into action, and I do not see how any wrong or injury can be said to have been done to any person to whom a false representation is made when the person to whom it is made knows it to be false. If the representation is known to be false, the person to whom it is made cannot be deceived by it. Looking at the case in this point of view, it opens a question of great general importance. The law has, for the wisest reasons, thrown around infants a protection against acts done by them during their infancy, and the policy of the law cannot be maintained if this privilege of infancy be allowed to be broken in upon on slight and insufficient grounds. If the contracts of infants with persons who know them to be under age are held to be binding upon the ground that the infants represented themselves to be of age, there will hardly be a case in which the plea of infancy will be of any effect, and the door will be open to all the frauds against infants which the law was intended to protect them from. The privilege of infancy is a legal privilege. On the one

10 Vt. 70; Bullock v. Babcock, 3 Wend. 391; Lewis v. Littlefield, 15 Maine, 233; Hartfield v. Roper, 21 Wend. 615; Brown v. Maxwell, 6 Hill (N. Y.), 592; Sikes v. Johnson, 16 Mass. 389; Walker v. Davis, 1 Gray, 506; Eaton v. Hill, 50 N. H. 235; Baxter v. Bush, 29 Vt. 465. Where an infant fraudulently obtained goods upon credit, not intending to pay for them, he was held liable in an action for the tort. Wallace v. Morse, 5 Hill (N. Y.), 391.

hand, it cannot be used by infants for the purposes of
* 466 fraud. * On the other hand, it cannot, I think, be allowed
to be infringed upon by persons who, knowing of the
infancy, must be taken also to know of the legal consequences
which attach to it. This decree, so far as I am aware, is in this
respect of the first impression, and I am not prepared to support
a precedent which goes so far to destroy the legal privileges of
infants. The Vice-Chancellor seems, as I collect from his judg-
ment, to have considered the knowledge imputed to Anne P.
Stocker to have been of no importance, because the representa-
tion was made to the solicitor; but, according to the evidence, the
solicitor was employed by her. He was her agent in the trans-
action. The settlement was prepared at her instance and for her
benefit; and if the representation made to Anne P. Stocker her-
self would not have rendered the covenant binding upon the
defendant, I do not see how the representation made to her
agent can have that effect. It may be said, indeed, that the
solicitor, had he been informed of the infancy, would have advised
some different settlement, but I do not see how this can improve
the plaintiffs' case. If there was a false representation made
under such circumstances as would render the covenant binding
upon the defendant, it would equally do so whether a different
settlement would have been made or not. It is indeed a mere
speculation whether a different settlement, or even any settle-
ment, would have been made if the infancy had been disclosed to
the solicitor; and it must be remembered, with reference to this
point, that, assuming, as I do, that Anne P. Stocker knew of the
infancy, it was her duty, no less her duty than it was the duty of
the defendant, to have apprised the solicitor of the fact; and
that if on the one hand there was false representation on the
part of the defendant, there was on the other hand suppression
on the part of Anne P. Stocker. It was much insisted upon on
the part of the plaintiffs that there had been adoption
* 467 * and confirmation by the defendant, but this is wholly
denied by the answer, and I can find no evidence of it
beyond the fact that the defendant took possession of the busi-
ness and stock in trade, and has continued in possession of it.¹
This, however, was property to which the defendant became enti-

¹ See Chitty Contr. (10th Am. ed.) 164, note (i¹), 170, and note (l), and cases cited.

tled *jure mariti*, and not by virtue of the settlement; and even if he can be considered to have purchased it by means of the settlement, it was not until March, 1857, that there was any trustee of the settlement to whom he could notify his dissent; and it is clear, from the correspondence referred to in the affidavit in reply, that at the time when the new trustee was appointed, the defendant was disputing the validity of the settlement. Looking to this correspondence, it is very remarkable, that this claim was not brought forward in the lifetime of Anne P. Stocker, when she might have been examined as to the facts on which the claim depends. Upon the whole case, much as I disapprove the conduct of this defendant, I cannot go the length of saying that he is bound by this covenant, and I am of opinion, therefore, that this bill ought to have been dismissed, and must be dismissed, but of course without costs.

* STRINGER v. GARDINER.

* 468

1859. July 2. Before the Lord Chancellor Lord CAMPBELL and the LORDS JUSTICES.

A testator gave legacies to "my niece Elizabeth S." When he made his will he had a great-great niece named Elizabeth Jane S. who was known to him, and there was not then any other person at all answering the description. He formerly had had a niece with whom he was intimate, and to whom he had by a former will made precisely the same bequests as those in question; but when he made his last will he knew that she had been dead some time. *Held*, that Elizabeth Jane S. was entitled to the legacies.¹

THIS was an appeal by the defendants from a decree of the Master of the Rolls, declaring the plaintiff Elizabeth Jane Stringer entitled to certain property given by the will of Benjamin Tapley.

The will made in 1852, contained the following gifts, on which the question turned: "I give and bequeath to my niece Elizabeth Stringer the sum of 20*l.* for mourning," and in a subsequent part of the will, "As to all that my cottage and premises called

¹ See 1 Jarman Wills (8d Eng. ed.) 353, 354, 387, 899, 400; 2 *ib.* 136, 139.

Rose Cottage, in trust for my said niece Elizabeth Stringer, her executors, administrators, and assigns."

At the time when the testator made his will, the plaintiff, who was the granddaughter of a niece of the testator, was about five years old, and was then and at the time of his death the only relative of his of the name of Stringer who had also the name Elizabeth. She was shown to have visited the testator.

The defendants urged, that the person meant by the will was the plaintiff's grandmother, Mrs. Elizabeth Stringer, a niece of the testator, with whom he had been on intimate terms. It appeared that Mrs. Stringer had died in 1848, before the date of the will, and that the testator had been present at her funeral.

The defendants in support of their case adduced the evidence of the solicitor who prepared the will, which evidence was * 469 to the following effect: The testator had * made a will in 1847, which contained bequests in precisely the same terms as those given above, at which time Mrs. Elizabeth Stringer was living and the plaintiff was only five months old. In January, 1850, the testator made a codicil, by which he revoked some of the legacies given by his will. In January, 1852, the testator instructed the solicitor to prepare a codicil to make some alterations in his testamentary dispositions, having no reference to the gifts to Elizabeth Stringer. The solicitor recommended him not to make a second codicil, but to execute a copy of his former will with such alterations as were requisite, to which the testator assented. The solicitor did not know that Elizabeth Stringer was dead, and altered the will in the particulars referred to by the testator, and, as he deposed, neither his attention nor that of the testator was directed to the fact of her death. The will as thus altered was executed, and was the will on which the question arose. The Master of the Rolls decided that this evidence was not admissible, and made a decree in favour of the plaintiff. The defendants appealed.

Mr. Roundell Palmer and *Mr. Lindley*, for the plaintiff, in support of the decree. — The evidence on which the defendants rely was rightly rejected. *Doe v. Hiscocks*, (a) Wigram on Evidence. (b) The defendants wish to adduce parol evidence, not to explain the testator's meaning, but to show that he meant

(a) 5 M. & W. 869.

(b) Page 169 (4th ed.).

nothing, — to strike a gift out of the will. *Bernasconi v. Atkinson*, (a) *Mostyn v. Mostyn*, (b) show that the evidence is inadmissible. The defendants rely on *Selwood v. Mildmay*, (c) a case which has * never been cited but to receive explanations; and it is difficult to see on what ground the result was arrived at. Wig. Evid., (d) *Miller v. Travers*. (e) The latter case shows that even a palpable blunder of the draftsman who prepared the will cannot be corrected by parol evidence. We sufficiently answer the description in the will, and our title can only be defeated by showing that some one else answers it at least as well. * 470

. *Mr. Selwyn* and *Mr. Deane*, for the appellants. — The testator, when he made his former will, had a niece exactly answering the description contained in the gifts now in question. We refer to the old will just as if it was a letter written by the testator, showing that Mrs. Elizabeth Stringer was a person with whom he was intimate, and who was an object of his bounty. She, we contend, was the person meant. The plaintiff does not properly answer the description either in respect of name or relationship. In *Crook v. Whitley*, (g) there were words of plurality used, but there was only one person strictly answering the description of niece, and she alone was held entitled. This shows that the meaning of the word is not lightly to be departed from. *Smith v. Lidiard* (h) is also against extending the meaning of the word “niece.” The testator cannot be supposed to have intended to give 20*l.* for mourning to an infant.

[THE LORD CHANCELLOR. — He may have expected to live twenty years.]

Then there is an absolute gift of the house as to an adult; in a gift to an infant we should expect to find provisions for maintenance. The argument on the other side proceeds on the assumption that the testator must have referred to some one

(a) 10 Hare, 345.

(d) Page 145.

(b) 5 H. L. Cas. 155.

(e) 8 Bing. 244.

(c) 3 Ves. 306.

(g) 7 De G., M. & G. 490 [Am. ed. note (1)].

(h) 3 K. & J. 252.

living when his will was made. *Prima facie*, he is no doubt to be taken to have done so, but this presumption, we
 * 471 submit, is * liable to be rebutted. *Maybank v. Brooks*, (a) is an instance of a testator making a disposition in favour of a person whom he knew to be dead.

A reply was not called for.

THE LORD CHANCELLOR. — I am of opinion that there is no ground whatever for this appeal. Looking at the will and at such parts of the evidence as are plainly admissible, I think that the plaintiff's title is established. There was, when the will was made, a person who answered sufficiently the description of "my niece Elizabeth Stringer." It is true that her name was Elizabeth Jane, but it is hardly to be called error of description to leave out one of her christian names and designate her simply by the other. She was a great-grand niece; still she was a niece, and there being no other person of any similar name who answered the description of niece at all, she was naturally described simply as "niece." At the time when the will was made there was no one else who in the slightest degree answered the description in the will; her grandmother, who had answered it precisely, was, as the testator well knew, in her grave when the will was made. As the plaintiff was living at the date of the will, was known to the testator, and sufficiently answers the description contained in the will, and as there was not any other person living, or whom the testator could suppose to be living, at the date of the will, who answered that description at all, we are bound judicially to hold that the plaintiff was the object of the testator's bounty. It is unnecessary to notice the argument grounded on the improbability that the testator would leave money to buy mourning for an infant.

* 472 * THE LORD JUSTICE KNIGHT BRUCE. — The appeal has nothing to recommend it but the names of the distinguished counsel who signed the certificate, and it ought, in my judgment, to be dismissed with costs.

The Lord Justice TURNER concurred.

(a) 1 Bro. C. C. 84.

MORTIMORE v. MORTIMORE.

1859. July 2. Before the Lord Chancellor Lord CAMPBELL and the LORDS JUSTICES.

An investment in railway mortgages and railway debenture stock: *held*, not to be authorized by a power to invest "upon the security by way of mortgage of any freehold, copyhold, or leasehold hereditaments."¹

THIS was a special case, which, by leave of the Court, was transferred from the paper of the Master of the Rolls.

• William Mortimore, by will made in 1858, directed his trustees or trustee to invest 2000*l*. "in their or his names or name in some or one of the public stocks or funds of Great Britain, or at interest upon government securities or upon the security, by way of mortgage, of any freehold, copyhold, or leasehold hereditaments, in England or Wales, or of a life-interest in any property real or personal, coupled with a policy of assurance on the life or lives for which such interest is holden, with power from time to time at discretion to vary the same stocks, funds, or securities." The testator then directed the income to be paid to his widow during widowhood, and subject to that trust gave the capital upon the trusts declared concerning his residuary estate. The testator then gave a number of large legacies upon trust for his children and their issue, and gave the residue to his wife * during widowhood with limitations over to his children, * 473 the directions for investment being given by reference to the above trust for investment. The testator died in 1858, leaving several children, of whom one only had attained twenty-one.

The widow was desirous of having part of the residue invested in railway mortgages, made under the provisions of the Companies Clauses Act, 1845, and a further part invested in the purchase of Great Northern debenture stock. One of the most eminent counsel at the equity bar having advised the trustees that, although they could not safely take upon themselves to make such investments without the sanction of the Court, it was by no

¹ See *Perry Trusts*, § 460; *Harris v. Harris*, 29 Beav. 107; *Lewin Trusts* (5th Eng. ed.), 264, 265.

means certain that the Court would decline to sanction them, the present case was presented in order to obtain the opinion of the Court whether such investments were authorized by the trusts of the will.

The debenture stock in question was created under "The Great Northern Railway Company's Increase of Capital Act, 1853," 16 & 17 Vict. c. 60. (a)

(a) The enactments relating to railway mortgages will be found in 8 Vict. c. 16, §§ 38 . . . 54.

The material enactments of 16 & 17 Vict. c. 60, as to the Great Northern Railway Debenture Stock, are as follows:—

19. It shall be lawful for the company from time to time, with the consent of three-fifths of the votes of the shareholders present in person or by proxy, at any general meeting of the company convened with due notice of that object, to resolve that any portion of the borrowed capital of the company then subsisting on the security of outstanding mortgages or bonds, or any debenture or other security for which or for the interest whereof the company are lawfully liable, not exceeding an amount to be defined in and by such resolution, may be converted into stock of the company of like amount, either by agreement with the holders of such mortgages or bonds or other security respectively, before the same respectively become due, or by paying off the same respectively when due, and issuing stock of a corresponding amount instead of reborrowing the sums so paid off; and also, with the like consent, from time to time to resolve that the whole or any part, to be defined in and by such resolution, of the moneys which the company shall have authority to raise by borrowing under the powers of any of their Acts, and which shall not then have been raised, shall or may be raised by the creation and issue of stock of a corresponding amount, instead of borrowing the same; and also, with the like consent, to attach to the stock so authorized to be created and issued for any of the purposes aforesaid a fixed and perpetual irredeemable yearly dividend or interest at any rate not exceeding the rate of four pounds for every one hundred pounds thereof, payable in equal half-yearly portions; and it shall thereupon be lawful for the directors of the company to carry into effect such resolution or resolutions, by the creation and issue of so much stock as may from time to time be necessary for that purpose, having such fixed rate of interest or dividend as aforesaid; and the stock so created and issued shall be a charge upon the *tolls and undertaking, and lands, tenements, and hereditaments of the company*, but shall be distributable, transmissible, and transferable as and in other respects have the incidents of personal estate; and the said interest or dividend shall for ever have priority of payment over all other dividends on any other stock or shares of the company, whether ordinary or preference, or guaranteed; and the stock when so created shall be termed "Great Northern Railway Debenture Stock."

22. If within thirty days after the dividend or interest on the said debent-

* *Mr. Eddis*, for the trustees, referred to *Mant v. Leith*, * 474 (a) and submitted the points to the Court.

* *Mr. Roundell Palmer* and *Mr. M. A. Shee*, for the *cestuis que trust*, contended that the proposed investments would be real securities, and as such authorized by the will. They referred to *Robinson v. Robinson*, (b) *Doe v. St. Helen's, &c. Railway Company*, (c) *Ashton v. Lord Langdale*. (d) * 475

THE LORD CHANCELLOR. — I am of opinion that neither of the proposed investments is of a description sanctioned by the trusts of the will. They may savour of realty sufficiently to come within the Act 9 Geo. 2, c. 36, and no doubt, they may in some sense be called real securities, but they are not such securities as to come within the meaning of the words used by the testator. Those words indicate only a mortgage of real property in the ordinary sense, a mortgage giving a remedy by ejectment. The

ure stock has become payable, and after demand thereof in writing, the same be not paid, the proprietor or proprietors of such stock holding individually or collectively an amount in nominal value of twenty thousand pounds or upwards, may (without prejudice to his and their right to sue for the dividend or interest so in arrear in any Court of competent jurisdiction) require the appointment of a receiver, by an application to be made as hereinafter provided.

23. Every application for a receiver in the cases aforesaid shall be made to two justices; and on any such application it shall be lawful for such justices, by order in writing, after hearing the parties, to appoint some person to receive the whole or a competent part of the tolls or sums liable to the payment of such dividends or interests, until all the arrears of dividends or interest which may then be due on the said stock, together with all costs, including the charges of receiving the tolls or sums aforesaid, be fully paid; and upon such appointment being made all such tolls and sums of money as aforesaid shall be paid to and received by the person so to be appointed, and the money so to be received shall be so much money received by or to the use of the proprietors of the said stock, or to the use of those of the proprietors to whom such dividends or interest shall be then due; and so soon as the full amount of such dividends, interests, and costs has been so received, the power of such receiver shall cease: provided always, that such receiver shall distribute ratably and without priority, among all the proprietors of the said stock to whom interest or dividends shall be in arrear, the tolls or moneys which shall so come to his hands.

(a) 15 Beav. 524.

(c) 2 Q. B. 364.

(b) 1 De G., M. & G. 262.

(d) 15 Jur. 868, V.-C. K. B.

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remedy upon the securities in question is uncertain. If a receiver were appointed there is no certainty that there would be any thing for him to receive. The case of *Robinson v. Robinson*,

which has been referred to decided no more than this, —

* 476 that a trustee who allowed money which his * testator had invested on securities of this nature to remain so invested, was not to be held personally liable, as for a breach of trust; and the Lord Justice KNIGHT BRUCE, in his judgment, distinctly pointed out that he should not sanction a trustee's making such an investment. That case, therefore, is not an authority in favour of the investments now proposed.

THE LORD JUSTICE KNIGHT BRUCE. — I also think that both the questions in this case must be answered in the negative; guarding myself however to this extent — that if the trustees had found among the testator's property at his death such railway stock and debentures as these, it may possibly be that the Court would not, in the case of their having retained the investments, have held them guilty of an error so clear as to render them liable to be visited with the consequences of a breach of trust. That may be so. I do not say that it is so; but when we are asked to sanction the changing of the testator's property from a proper state of investment to such investments as these, not only ought the application in my judgment to be refused, but, subject to the opinion of the Lord Chancellor and the Lord Justice, I think that the costs of it ought to be borne by the income payable to the tenant for life.

THE LORD JUSTICE TURNER. — I entirely agree.

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* KING v. CLEAVELAND.

* 477

1859. June 24. July 2. Before the Lord Chancellor Lord CAMPBELL and the LORDS JUSTICES.

Stock was bequeathed in trust for the testator's brother and the brother's wife for their lives¹ successively, and after their decease in trust to be divided equally amongst the testator's nephews and nieces, children of the brother, then living, or their legal personal representatives. *Held*, that the representatives of nephews and nieces dying in the lifetime of the surviving tenant for life took shares, and that such representatives were the next of kin, and not the executors or administrators of the nephews and nieces.¹

THIS was an appeal from the decision of the Master of the Rolls upon the construction of a will.

Samuel Cleaveland, by his will dated the 3d of August, 1841, bequeathed as follows: "I give and bequeath to the said Richard Francis Cleaveland and John Tregonwell King, and the survivor of them, his heirs, executors, and administrators, the sum of 4000*l*. (being a part of 7000*l*. now standing in my name in the three and a half per cent annuities or funds of this kingdom) upon trust, to stand possessed thereof and to pay and apply the interest and dividends thereof to and for the use and behoof of my brother Richard Francis Cleaveland and his wife Eliza Cleaveland, and the survivor of them, for his and her natural lives. And after the decease of my said brother and his said wife, then in trust to pay and apply the said sum of 4000*l*. stock equally amongst my nephews and nieces, children of my said brother Richard Francis Cleaveland and his said wife then living, or their legal personal representatives, share and share alike."

The testator died on the 31st of March, 1844.

Richard Francis Cleaveland and Eliza his wife had seven children, four of whom were defendants. Two others died in 1843, in the lifetime of the testator. One of them, named Richard Francis Cleaveland, left a widow and children. The

¹ See 2 Story Eq. Jur. § 1065 *b*; *Holloway v. Radcliffe*, 23 Beav. 163; 1 Jarman Wills (3d Eng. ed.), 99; *Stockdale v. Nicholson*, L. R. 4 Eq. 359; *Appleton v. Rowley*, L. R. 8 Eq. 139; *In re Philps's Will*, L. R. 7 Eq. 151; *Redfield Wills* (1st ed.), 401 *et seq.*

other, Henrietta Maria Cleaveland, married the appellant * 478 George Foster St. * Barbe. At her death, in 1843, her father was her next of kin, and the appellant became her administrator. The remaining child, George Cleaveland, died in 1855, leaving a widow and children. His widow was his administratrix.

Richard Francis Cleaveland, the testator's brother, died in 1849, and his wife in 1857.

The bill was filed by the surviving trustee of the will to have the true construction declared of the gift to the children of Robert Francis and Eliza Cleaveland.

The Master of the Rolls held, that the next of kin of the nephews and nieces who died in the lifetime of the testator, or of the surviving tenant for life, were entitled to participate in the legacy.

The case is reported below in the 26th volume of Mr. Beavan's Reports. (a)

Mr. St. Barbe appealed.

Mr. Selwyn and *Mr. Hobhouse* for the appellant. — The words "legal personal representatives" were meant to give absolute interests to the nephews and nieces, notwithstanding their death in the lifetime of the testator or tenant for life. The gift has two alternatives. If all the nephews and nieces were living at the death of the surviving tenant for life, all were intended to take. If some were living and some dead, the gift was meant for those living, and the legal personal representatives of those who were dead.

* 479 * They referred to and commented upon *Tidwell v. Ariel*, (b) *Re Porter's Trust*, (c) *Bone v. Cook*, (d) *Corbyn v. French*, (e) *Coulthurst v. Carter*, (g) *Christopherson v. Naylor*, (h) *Tytherleigh v. Harben*, (i) *Jarvis v. Pond*, (k) *Hinchliffe*

(a) Pages 26, 166.

(b) 3 Madd. 403.

(c) 4 K. & J. 188.

(d) M'Cl. 168.

(e) 4 Ves. 418.

(g) 15 Beav. 421.

(h) 1 Meriv. 320.

(i) 6 Sim. 329.

(k) 9 Sim. 549.

v. *Westwood*, (a) *Re Crawford's Trusts*, (b) *Dixon v. Dixon*, (c) *Doody v. Higgins*. (d)

Mr. Amphlett and *Mr. C. Hall*, for the executor of the father of *Mrs. St. Barbe*, who was her next of kin.—The words “share and share alike” show that legal personal representatives are not meant in their ordinary sense, and that the next of kin are entitled.

They referred to and commented upon *Walker v. Marquis of Camden*, (e) *Cotton v. Cotton*, (g) *Smith v. Palmer*, (h) *Robinson v. Smith*. (i)

Mr. Seed, *Mr. Lloyd*, *Mr. Martelli*, *Mr. Osborne*, *Mr. Wickens*, and *Mr. Harrison* appeared for other parties.

Judgment reserved.

THE LORD CHANCELLOR. — Although the appellant *George Foster St. Barbe* appeals only against that part of the decree of the Master of the Rolls by which he was excluded from the one-seventh of the fund in controversy, which by the decree * would go to the next of kin of his deceased wife *Henri- * 480* *etta Maria*, one of the nieces of the testator, I think that we are bound to say whether we agree with his Honor in that part of his decree by which he directs that the fund shall be divided into sevenths, to go among the four nephews and nieces who survived the two tenants for life and those who answer the designation of the “legal personal representatives” of the three others, two of whom died in the lifetime of the testator, and one died after his death, and before the death of the surviving tenant for life.

During the argument it was suggested that the four who survived the two tenants for life are entitled to the whole of the fund. This depends upon the construction to be given to these words, “And after the decease of my said brother and his said

(a) 2 De G. & Sm. 216.

(b) 2 Drew. 230.

(c) 24 Beav. 129.

(d) 2 K. & J. 729.

(e) 16 Sim. 329.

(g) 2 Beav. 67.

(h) 7 Hare, 225.

(i) 6 Sim. 47.

wife, then in trust to pay and apply the said sum of 4000*l.* stock equally amongst my nephews and nieces, children of my said brother Richard Francis Cleaveland and his wife then living, or their legal personal representatives, share and share alike." Stopping at the words "then living," unquestionably the claim in favour of the four surviving nephews and nieces would prevail; and so it would be if the words "or their legal representatives" could be considered words of limitation unnecessarily added. But, looking at the whole of the will, I think it quite clear that the testator designates the two classes of legatees who should both take directly, and neither of them by representation; first, the nephews and nieces living at the death of the surviving tenant for life; and, secondly, the persons who should answer the description the "legal personal representatives" of the nephews and nieces dying before the surviving tenant for life. There certainly is no antecedent to which the word "their," before

"personal representatives," can be grammatically referred,
 * 481 but * the meaning of the testator seems to have been that the fund should be divided among the nephews and nieces who should be alive at the death of the surviving tenant for life, and the representatives of those who should have died before that time. To construe the words "their legal personal representatives" as words of limitation is to deprive them of all power whatever. The testator could hardly have intended that if a nephew or niece should die in the lifetime of one of the tenants for life, leaving children, those children should take nothing under the will; and when it is considered that these legal personal representatives were to take "share and share alike," not in any fiduciary capacity, but beneficially, it seems impossible to suppose that the words, "or their legal personal representatives," can be referred to the "executors or administrators" of the nephews and nieces living at the death of the tenant for life.

The construction of the will, by which the testator is supposed to have created two classes of legatees, seems to me to be, according to the intention of the testator, to be gathered from the language he has employed, and is, I think, fully sanctioned by the authorities which are cited by the Master of the Rolls in his judgment, and which I consider it unnecessary now to restate or to comment upon.

Thus, being of opinion that one-seventh of the fund was prop-

erly directed to go to the legal personal representative of the deceased Henrietta Maria Cleaveland, who was married to the appellant George Foster St. Barbe, I come to the question, directly raised by the appeal, whether he, having obtained administration to her, is to be considered her "legal personal representative" within the meaning of the will?

* According to the strict literal and primary meaning * 482 of the words, he unquestionably is her legal personal representative, and his claim must prevail unless we can clearly see, looking to the language of the will, that the testator used the words in another sense. But when it is considered as decided by the first part of the decree appealed against, that the "legal personal representatives" take as a class directly and beneficially, I think that the testator cannot be considered to have used the words in their strict literal and primary sense. *Mr. Selwyn*, in his able argument, allowed that he could not rely upon any distinction between the legal personal representative of a deceased married niece and the legal personal representatives of any of the other nephews and nieces; and he contended that with regard to all the nephews and nieces, the person who is the executor or administrator of a deceased nephew or niece must take a seventh; and further, that not taking it by substitution or as representing the deceased nephew or niece, he must take it beneficially. But surely this would lead to a great absurdity, and would be quite contrary to the intention of the testator; for then a stranger in blood of a deceased nephew or niece happening to be named executor by will, or a creditor who obtains administration, would take the seventh share of the fund for his own use, and the next of kin of the deceased nephew or niece would take no benefit under the will. I attach great importance to the words in this will, "share and share alike," as indicating that each individual of each class was to take beneficially, and as repelling the presumption that the words, "legal personal representatives" are used in their strict literal and primary sense for executors or administrators. In what sense are these words to be understood? I think as designating "next of kin," or "the person or persons taking the personal estate under the Statute of Distributions," who in a popular * sense represent the deceased. * 483 There is a well-known class of cases in which the words "legal representatives" have received this construction. *Bridge*

v. *Abbott*, (a) *Cotton v. Cotton*, (b) *Smith v. Palmer*, (c) *Walter v. Makin*. (d) So the words "personal representatives" have received the same construction. *Baines v. Ottey*, (e) *Robinson v. Smith*, (g) *Wilson v. Pilkington*, (h) *Atherton v. Crowther*. (i) So, to effectuate the intention of the testator, the same sense has been given even to the words "executors and administrators." In *Palin v. Hills*, (k) where a testator, after bequeathing certain pecuniary legacies, declared that in case of the death of any or either of his legatees, his or her legacy should go to his or her executors or administrators, Sir JOHN LEACH having held that the residuary legatee of one of the legatees, who died in the testator's lifetime, was entitled to the legacy, this decree was reversed on appeal by the Lord Chancellor, who decided in favour of the next of kin, thinking that such a gift to executors and administrators was undistinguishable from a gift to legal representatives.

Doody v. Higgins, (l) and *In re Walton*, (m) were relied upon by the appellant's counsel as establishing a contrary doctrine; but they are clearly distinguishable. In both, the word "heirs" was the word to be construed. In the first, it was held to mean "the next of kin," according to the Statute of Distributions; in the second, the Court was of opinion, upon the whole of the will, that it meant "executors," and was superfluous.

* 484 * The only case cited which raised a doubt in my mind was *Hinchliffe v. Westwood*, (n) before Lord Justice KNIGHT BRUCE when Vice-Chancellor. In that case there was a bequest to the testator's daughter for life, and after her death equally amongst the testator's three sons (naming them), and in case of the death of all or any of his said sons in the lifetime of his said daughter, then he bequeathed the share or shares to become due upon the contingency aforesaid, of him or them so dying, to his or their legal personal representative or representatives. Two sons died in the interval between the death of the testator and the death of his daughter, and the Vice-Chancellor held, that the executors were entitled as against the next of kin.

(a) 3 Bro. C. C. 224.

(b) 2 Beav. 67.

(c) 7 Hare, 225.

(d) 6 Sim. 148.

(e) 1 Myl. & K. 465.

(g) 6 Sim. 47.

(h) 11 Jur. 537.

(i) 2 W. R. 639.

(k) 1 Myl. & K. 470.

(l) 2 K. & J. 729.

(m) 25 L. J. Ch. 569.

(n) 2 De G. & Sm. 216.

His Lordship appears to have placed reliance upon the double adjective "legal personal." If that alone distinguished this case from the cases I have referred to, where the description of the representative was only by a single adjective, legal representative or personal representative, with the most profound and sincere respect for my brother Judge, I should think that it ought not to outweigh those authorities; for, the strict literal primary meaning of "legal representative" or of "personal representative" is executor or administrator, and I do not see how the distinction is at all strengthened by the duplication of the adjective "legal personal representative." The intention of the testator to benefit the next of kin rather than the executor or administrator may have effect even when the words executors or administrators are used. But, in *Hinchliffe v. Westwood*, the bequest does not contain the words "share and share alike," nor does the will raise any probability that the intention of the testator would be contravened by preferring the executor to the next of kin.

* It therefore seems to me that, both according to the * 485 probable intention of this testator, to be gathered from reading the will and according to the weight of authority, we ought in this case to decide in favour of the next of kin—to exclude the husband and to dismiss the appeal.

THE LORD JUSTICE KNIGHT BRUCE.—I have been unable to free my mind from doubt whether, in construing the singularly expressed will before the Court in this case, the phrase, "or their legal personal representatives, share and share alike," ought to have been deemed of importance. In other words, I am not satisfied that the instrument ought not to have been interpreted, as it would have been if the whole of the phrase had been omitted. Upon the assumption, however, of this view being inadmissible (upon the assumption, I mean, that the phrase "or their legal personal representatives, share and share alike," is material, and to be regarded and have influence in the interpretation of the will), we have had to consider whether the expression "legal personal representatives," as used in the instrument, imports or points to consanguinity, and I am unable to represent myself as satisfied that it does.

There is still another point; namely, whether any nephew or niece of the testator who died in his lifetime, though after the

making of the will, ought, for any purpose of it, — ought in any manner with reference to it, — to have been reckoned or taken into account or consideration. As to this, also, I am not convinced.

Certainly, therefore, although the appellant Mr. George Foster St. Barbe is, according to what I consider a correct use of language, the legal personal representative of his wife, who
 * 486 died in the testator's lifetime * (whatever the testator may have meant by the expression "legal personal representatives"), I cannot be said to be in favour of giving the appellant more than the Lord Chancellor and the Lord Justice TURNER (who agrees with the Lord Chancellor) are willing to give him, nor is there any difference of opinion in the Court as to costs.

THE LORD JUSTICE TURNER. — Samuel Cleaveland, the testator in this cause, has by his will given and bequeathed to Richard Francis Cleaveland and John Tregonwell King, and the survivor of them, his heirs, executors, and administrators, the sum of 4000*l.*, part of 7000*l.* standing in his name in the three and a half per cent annuities, upon trust, to pay the interest and dividends thereof to and for the use and behoof of his brother Richard Francis Cleaveland, and his wife Eliza Cleaveland, and the survivor of them, for his and her natural life, and after the decease of his said brother and his said wife, then in trust to pay and apply the said sum of 4000*l.* stock equally amongst the nephews and nieces, children of his said brother Richard Francis Cleaveland, and his said wife then living, or their legal personal representatives, share and share alike. There were seven children of Richard Francis Cleaveland and his wife living at the date of the will; two of them afterwards died in the lifetime of the testator, another of them survived the testator but died in the lifetime of the tenants for life, the remaining four survived the tenants for life. The Master of the Rolls by his decree has directed the fund to be divided into seven equal shares, and has given one-seventh to each of the four surviving children and one-seventh to the next of kin, according to the Statute of Distributions, of each of the deceased children, the next of kin of each deceased child taking the seventh in equal shares.

* 487 * The appeal before us is by the husband of one of the children who died in the testator's lifetime, and who is also administrator of his deceased wife, not complaining of the

division of the fund into seven shares, but insisting that he, as administrator of his deceased wife, is entitled to the seventh share, which by the decree has been given to her next of kin. The precise question, therefore, raised by the appeal, is, whether the husband and administrator is entitled under the disposition of this will to the legal personal representatives, or whether the next of kin are entitled under that disposition.

In determining this question the point to be considered seems to me to be, what is the effect to be attributed to the word "or" which precedes, and to the words "share and share alike," which follow upon the words "legal personal representatives," whether the words thus preceding and following constitute the gift to the legal personal representatives a separate and independent gift. For, if the words have that effect, we cannot, I think, impute to the testator that he used the words "legal personal representatives" in their common and ordinary sense. It is absurd to suppose that a testator could intend to give to executors or administrators share and share alike. Now, the word "or" in this case, following, as it does, immediately upon the words "then living," seems to me to be the proper commencement of an independent gift. The testator having completed the gift to the children then living, it occurs to him that some of the children may have died; and he proceeds to provide for that event, and does so by extending the gift to their legal personal representatives. This word "or" seems to me to be put in opposition to the words "then living," and to have the same effect as if the testator had said, or in case any of them be then dead, to their legal personal representatives; and I think the words "share and share alike," *following upon the words *488 "legal personal representatives," confirm this view. For it is a good rule of construction that every word ought, if possible, to have its effect, and unless these words be considered as part of an independent bequest, they would have no operation; the word "equally," at the commencement of the gift, overriding the whole disposition.

It may be said that, if the will be read as I think it should be read, as giving the fund to the children then living, or in case any of them be then dead to their legal personal representatives, the gift ought to be confined to the children who were living at the death of the testator; although this is an argument which of

course the appellant could not use, as it would exclude him altogether: but I do not think this consequence would follow; for assuming the gift to the legal personal representatives to be, as I take it to be, an independent gift, I see nothing to limit its operation, and prevent its extending to children who were living at the date of the will and afterwards died in the testator's lifetime.

It has been observed that there is no proper antecedent to the word "their," and of course it could not be meant to refer (as in ordinary construction it would) to the last antecedent, the children then living. But I think it may well be referred to the children generally; and the reference so construed seems to me further to confirm the view of the gift having been intended as an independent gift.

That this testator did not intend to give to the legal personal representatives of the children, in the ordinary sense of the term, seems to me, also, to be strongly evidenced by the context of the will, in which he has very constantly used the expression

*489 executors and administrators; * and upon the whole, therefore, I think that the conclusion at which the Master of the Rolls has arrived, the point before us is correct, and that this appeal must be dismissed.

In resting my judgment as I have done upon the intention to be collected from this particular will, I desire not to be understood as in any way differing from the conclusions drawn from the cases which the Lord Chancellor has expressed. On the contrary, I agree in his views.

I think the appellant should have no costs of the appeal, but that it is a fair case for returning the deposit; the respondents taking their costs in the same way and with the same limitations as to double sets of costs as were ordered by the decree.

* THOMPSON v. WHITELOCK.

* 490

1859. June 13, 15. July 4. Before the LORDS JUSTICES.

A testator gave to each of his brothers and sisters named in his will "or to their legal representatives" 500*l.*, to be paid them in two years after his death. He then gave legacies to several nephews and nieces by name. The whole amount of the above legacies was 6100*l.* He gave the residue to his wife, "except 4100*l.*, of which she is only to have the use during her natural life, and which I wish to be divided amongst my relations, to whom I have left legacies in the fore part of this instrument, in proportion to the legacies left above, which will just make their legacies double the first bequest." On inspecting the original will, which was a holograph, 4100*l.* seemed to have been substituted for 5100*l.*¹

Held, that the intention to double the original legacies was not sufficiently clear to justify the Court in holding that 4100*l.* was written by mistake for 6100*l.*¹

Held, also, that the words "or to their legal representatives," did not amount to a substitutionary gift of the share of a sister who died in the testator's lifetime in the 4100*l.*

Held, also, that the 4100*l.* was not so taken out of the residue as to prevent the shares of it which lapsed from going to the residuary legatee.

THIS case came before the Court on two appeals by the plaintiff from decisions of Vice-Chancellor STUART.

Miles Whitelock, the testator in the cause, made his will dated 4th March, 1815, in the following words:—

"Know all men by these presents, that I, Miles Whitelock, being in good health and in sound mind, have determined upon making my last will and testament, and I do will and devise the whole of my property as hereafter stated. In the first place, I leave to each of my three brothers and six sisters, that is to say, to my brothers William, John, and Edward, and my sisters: Mary, wife of Joseph Thompson, now of Shelton in the parish of Shelton and county of Cumberland; my sister Isabella, wife of William Thompson, of Redman in the aforesaid county; my sister Margaret, wife of Miles Swinburn, of Shelton, aforesaid; my sister Sarah, widow of John Lancaster, of Shelton, aforesaid, and my sisters Rebecca and Ann, both spinsters, living with my

¹ See 1 Jarman Wills (3d Eng. ed.), 453, 470; *Hart v. Tulk*, 2 De G., M. & G. 300, and note (1).

father at Shelton aforesaid (that is to say), I leave and bequeath to each of the above-named brothers and sisters [or to their legal representatives], the sum of five hundred pounds, to * 491 * be paid them in two years after the time of my death. I also leave to my nephew William Thompson, son of William Thompson and my sister Isabella, the sum of five hundred pounds; and I leave to my nephew Edward Whitelock, son of my brother Edward Whitelock, the sum of five hundred pounds; and I likewise leave to my two nephews Lancaster, sons of my sister, widow of John Lancaster (the Christian names of which nephews I have forgot), the sum of three hundred pounds each. I also leave to my father and mother William and Rebecca Whitelock, of Shelton aforesaid, an annuity of one hundred pounds per annum, to be paid them quarterly, and to commence in twelve months after my decease; and the whole of the remainder of my property I leave to my dearly beloved wife Sarah, for her to have the sole disposal of it, except four thousand [one hundred] pounds, of which she is only to have the use during her natural life, and which I wish to be divided amongst my relations, to whom I have left legacies in the fore part of this instrument, in proportion to the legacies left above, which will just make their legacy double the first bequest. [Then followed gifts of various legacies which need not be stated.] In witness of this my intention for the above manner of disposing of my property, I have hereto signed my name this 4th day of March, 1815. MILES WHITELOCK."

"I likewise bear witness that the interlineations of 'or to their legal representatives;' as well as 'one hundred,' which appear in this document, were both inserted by myself.

"M. W."

The testator died shortly after the date of his will. His sister Mary Thompson and his nephew William Thompson died * 492 in his lifetime; the rest of his legatees * survived him. Letters of administration with the will annexed were granted to the testator's widow. The plaintiff was the personal representative of Isabella Thompson, who died in 1845, and in 1856 he filed his bill to have the legacy in which the widow had a life-interest set apart and invested.

On 17th July, 1857, the Vice-Chancellor made a decree declaring that the widow was entitled to the whole clear residue of the testator's estate, except the pecuniary legacies mentioned in the will and 4100*l.*, and ordering her to pay 4100*l.* into Court. Directions were given for investment of this sum and payment of the dividends to the widow during her life or until further order, and the decree was to be without prejudice to the question, whether any part of the legacy of 4100*l.* lapsed by the death of the two legatees in the testator's lifetime.

The plaintiff appealed against the above declarations, and such other parts of the decree as were consequent thereon.

Before the appeal had been heard Sarah Whitelock the widow died, upon which, such of the testator's brothers, sisters, nephews, and nieces as were still living, and the representatives of some of those of them who survived the testator, but had since died, presented a petition claiming to have the whole of the 4100*l.* divided among the brothers, sisters, nephews, and nieces who were living at the testator's death, or their representatives, in shares proportioned, to the legacies given to them in the first part of the will, thus treating the gift as a gift to a class, so as to exclude the doctrine of lapse. The representatives of Sarah Whitelock contended that the gift was not a gift to a class, and that the shares of the sister and nephew who died in the testator's lifetime *lapsed and fell into the residue. The * 493 representatives of the sister contended that they took her share by substitution, and the next of kin of the testator contended that the 4100*l.* was wholly taken out of the residue, and claimed the shares of Mary Thompson and William Thompson as not disposed of by the will.

The Vice-Chancellor upon this petition made an order dated 29th April, 1858, declaring that, by reason of the deaths of Mary Thompson and William Thompson in the lifetime of the testator, the shares to which they would have been entitled, if living at the death of the testator, in the 4100*l.* lapsed and fell into the residue of the personal estate and devolved upon Sarah Whitelock, the residuary legatee. The order went on to provide for distribution of the 4100*l.* accordingly. The plaintiff appealed against this order.

On the hearing of the appeals their Lordships had the original

will produced. It was a holograph, the words which are enclosed in brackets were interlined by the testator, and the word "four" in the expression "four thousand one hundred pounds" was written in a different ink and so as to obliterate another word which seemed to have been "five."

Mr. Malins and *Mr. Rogers*, in support of the appeal from the decree. — The object of the testator was to double the legacies, and to effect this the exception from the residue must be treated as if it had been written 6100*l.* *Milner v. Milner*, (a) *Trevor v.*

Trevor, (b) *Jordan v. Fortescue*, (c) *Ouseley v. Anstruther*. (d) The words of a gift may be *departed from *494 when the testator has evidently made a mistake and the will shows what the mistake was. Thus, if a legacy is given to each of the "three children" of a specified person, and he has in fact four, all four take.

Sir F. Goldsmid and *Mr. P. A. Kingdon*, for the personal representative of *Mrs. Whitelock*. — In the cases cited the testator expressed a definite intention to make up a certain sum: here he only makes a remark that what he has given will make it up. It is analogous to a case of false demonstration, the erroneous addition is to be disregarded; it might with as much propriety be contended that this clause cuts down the legacies previously given. Moreover, "just" does not necessarily mean "exactly," it may mean "nearly," and that is its proper interpretation here, for if construed "exactly" it is surplusage. Giving a reason will not control plain words. *Cole v. Wade*, (e) and observations in *Smith v. Fitzgerald*, (g) are against the appellant.

Mr. Malins, in reply.

Mr. Malins and *Mr. Rogers*, in support of the appeal from the order on the petition. — The sum set apart for the postponed legacies is excluded from the residuary gift, and the shares of it which have lapsed go to the next of kin. *Attorney-General v.*

(a) 1 Ves. Sen. 105.

(b) 5 Russ. 24.

(c) 10 Beav. 259.

(d) 10 Beav. 459.

(e) 16 Ves. 27, 48.

(g) 3 V. & Bea. 2.

Johnson, (a) *Skrymsher v. Northcote*, (b) *Easum v. Appleford*, (c) *Lloyd v. Lloyd*. (d)

Mr. Little, for the next of kin of Mary Thompson. — The words, “or their legal personal representatives,” * constitute a substitutionary gift in the event of a legatee * 495 dying before his legacy became payable. *Gittings v. M'Dermott*. (e) *Tidwell v. Ariel*, (g) is distinguishable — the gift there was to the original legatee simply, and afterwards followed a superadded direction as to the time of payment, to which, and not to the gift, the alternative words were annexed. The postponed legacies must follow the same rule as the original legacies, although the words of substitution are not repeated. *Milsom v. Awdry*. (h) The next of kin take under the words “legal personal representatives.” *Bridge v. Abbot*, (i) *Long v. Blackall*, (k) *Walter v. Makin*, (l) *Cotton v. Cotton*. (m) The words exclude the 4100*l.* from the residue.

Sir F. Goldsmid and *Mr. P. A. Kingdon*, for the representative of the widow. — The 4100*l.* was taken out of the residue only for a particular purpose, and that purpose having failed, it falls back. *Evans v. Jones*, (n) *James v. Irving*, (o) *Cambridge v. Rous*. (p) *Tidwell v. Ariel* is conclusive against the plaintiff's claim, such words as those here used produce a substitution so as to prevent lapse only in those cases where there is no postponement of the legacy. *Corbyn v. French*. (q) The words “legal personal representatives” will not be construed next of kin, unless by virtue of an explanatory context. *Re Crawford's Trust*. (r)

Mr. Malins, in reply.

Judgment reserved.

(a) Ambl. 577.

(b) 1 Sw. 566.

(d) 4 Beav. 231. See also *Green v. Pertwee*, 5 Hare, 249.

(e) 2 Myl. & K. 69.

(g) 3 Madd. 403.

(h) 5 Ves. 465.

(i) 3 Bro. C. C. 224.

(k) 3 Ves. 486.

(l) 6 Sim. 148.

(c) 5 My. & Cr. 56.

(m) 2 Beav. 67.

(n) 2 Coll. 516.

(o) 10 Beav. 276.

(p) 8 Ves. 12, 25.

(q) 4 Ves. 418, 435.

(r) 2 Drew. 230.

July 4.

* 496 *THE LORD JUSTICE KNIGHT BRUCE. — In this appeal there are three points for decision, each of them being a question of construction arising on the will of Mr. Miles Whitelock, a tradesman or merchant of London, who died in the month of November, 1817, survived by his wife mentioned in the will, who lived for many years after him.

The bill in the cause does not state the whole but states probably enough of the instrument, and though setting forth what the bill does set forth of the will not with exact accuracy, does not seem importantly erroneous in that respect. The will produced here from Doctors' Commons and examined by us appears to be wholly in the testator's handwriting. He seems to have considered it with some attention, and to have corrected or altered the original writing in more than one place, with his own hand, I repeat. The entire instrument which uniformly expresses sums in words (not by figures) is thus: [His Lordship read the will.]

"The words "or to their legal representatives," and the two words "one hundred," part of the phrase "four thousand one hundred pounds" are interlined — in which phrase also the word "four" seems, according to the best of my judgment, to have been originally written "five." As I understand, two of the testator's nephews, mentioned in the will as legatees, died in his lifetime after the will, and Mary Thompson, one of the testator's sisters mentioned in it as a legatee, did so likewise.

The points argued have been, as I said, three. First, whether by the force of the words "or to their legal representatives," interlined in the will, each or either of the legacies given

* 497 by it to Mary Thompson, the sister * who died between the making of the will and the testator's death, was prevented from lapsing, that is to say, given by way of substitution to her husband, who survived her, or to her next of kin living, either at her death or at the decease of the testator, and I think that it was not. These words, if of any effect or meaning as to the former legacy, were applied, I think, by him only to the event of death happening after his death; that is to say, within two years after that event; and they appear to me certainly not to have been meant to have any application to the legacy post-

poned in payment until the death of his wife. There was, therefore, as I conceive, a lapse as to the bequests made to the sister Mary Thompson who died as has been stated.

Then with regard to the second point, it is said that the lapsed portion of the legacy called by the will 4100*l.*, did not fall into the residue for the benefit of the wife as residuary legatee, but is undisposed of. From this proposition I also dissent, thinking that the restrictive words "except 4100*l.*, of which she is only to have the use during her natural life," were not meant to take away and did not take away the right of the widow as residuary legatee to any part of the legacy called 4100*l.*, of which the gift should fail by lapse. It seems to me that for every purpose the gift of what he meant by "4100*l.*" must be taken as merely a postponed bequest, liable to all the consequences of lapse in the ordinary way. I conceive that the "exception," and the word "only" which follows it, were not intended to prejudice or affect the wife otherwise than so far merely as might be necessary to protect the interest of the legatees of what he called "4100*l.*," or of so much of that subject of bequest as might not lapse. There has, I conceive, not been intestacy total or partial.

* Then as to the third point. The first set of legacies *498 to his "relations" having been in amount 6100*l.*, it has been in support of the appeal argued, that, by force or reason of the words, "which will just make their legacy double the first bequest," the expression "4100*l.*" ought to be read and construed as meaning "6100*l.*," which amount the testator, it is said, meant to give after his wife's death to those relations, in addition to the first 6100*l.* This contention appeared, and still appears, to me plausible, though the appeal as to the third point calls on the Court to read the word "just" as meaning "exactly," which, perhaps, as used by the testator, it does mean. The testator, on that assumption, must be deemed to have made a miscalculation or mistake, but does it necessarily follow that in giving or by giving what he calls "four thousand one hundred pounds," he meant to give "six thousand one hundred pounds?" Of this I am not satisfied. I think that he may have intended to give only 4100*l.* of postponed legacies, that is to say, of legacies not payable during his wife's life, though erroneously calculating the amount of the legacies to relations not so postponed, and thus,

at the moment, deeming that amount to be not more than 4100*l.* He has said “four thousand one hundred pounds.” From this expression there ought not, I think, to be a departure without convincing evidence that *aliter sensit*. To me the entire will does not make it manifest *aliter sensisse testatorem*. Probably it is as reasonable to suppose that the testator meant the second set of legacies not in any event or case to exceed 4100*l.* in amount, as to suppose that he meant it to equal in amount the first set, whatever the true amount of that first set accurately calculated might be. And though doubting, I cannot say that I differ from the conclusion in favour of the residuary legatee in this respect, at which the Vice-Chancellor has arrived.

* 499 * THE LORD JUSTICE TURNER. — Miles Whitelock, the testator in this cause, has by his will given to each of his three brothers and six sisters or to their legal representatives the sum of 500*l.*, to be paid them in two years after the time of his death, — to two nephews the sum of 500*l.* each, and to two other nephews the sum of 300*l.* each, the legacies to the brothers and sisters and nephews amounting therefore in the whole to 6100*l.* He has then given to his father and mother an annuity of 100*l.* and has then made the following disposition: [His Lordship read the residuary disposition.] Upon the original will being produced before us, it has appeared that the words “or to their legal representatives,” following the bequest to the brothers and sisters, are interlined; that the word “four,” where it occurs amongst the words “except four thousand one hundred pounds” contained in the residuary clause, is written in a different ink from the rest of the will, and is written over another word which, as far as I can judge, was originally five, and that the words “one hundred,” in the same expression “four thousand one hundred pounds,” are interlined. The Vice-Chancellor Sir JOHN STUART, by his decree in the cause, has declared: [His Lordship read the declaration given above] and Sarah Whitelock, the widow of the testator, having died after the date of the decree, his Honor has also by an order made upon petition in the cause for the distribution of the fund declared, that by reason of the deaths of Mary Thompson and William Thompson, two of the legatees of 500*l.* each, who died in the lifetime of the testator, the shares to which they would have been entitled, if living at the death of the testator,

in the 4100*l.*, lapsed and fell into the residue of the personal estate, and devolved upon Sarah Whitelock the residuary legatee.

* The appeals before us bring these decisions under * 500 review. The first and most important question arises on the decree. The appellant contends that the sum, which ought to have been deducted from the residue and appropriated to the legacies to be paid after the death of the wife, was 6100*l.*, and not 4100*l.* as the decree has declared. He so contends upon the ground that the testator's intention appears by the will to have been that the legacies given to his relations in the forepart of his will should be doubled after the death of his wife; that 6100*l.* is the sum which is necessary for that purpose, and that the sum of 4100*l.* was written in the will by mistake instead of the larger sum of 6100*l.* It may well be that a mistake of this description can be set right by this Court, for it is the duty of the Court to carry out the intention of the testator; and if it be demonstrated on the face of the will that the intention of the testator was different from what his words express, it is by his intention so demonstrated, and not by his words, the Court must be guided. The cases cited in the argument sufficiently establish this point; but this rule of giving effect to the intention, and not being governed by the words, is one which must be acted upon with the utmost caution. It was well said in *Mellish v. Mellish*, (a) with reference to a case of this description, "The rule is, that wherever there is a clear mistake, or a clear omission, recourse is to be had to the general scope of the will and the general intention to be collected from it, but the first thing to be proved is that there is a mistake. Whenever it comes to be a doubt, the safest way is to adhere to the words." The true question therefore in this case is, whether there is a clear mistake, or whether it becomes a doubt, and I think the true answer to the question is, that it comes to be a doubt. This will is holograph. It is the will of a * testator who was engaged in trade, and * 501 who must be assumed, therefore, to have been fully competent to make the calculation what sum would be required to double the legacies to which he referred. He altered the sum which he intended to be devoted to that purpose; and if, therefore, he made any mistake at all, he twice made that mistake.

(a) 4 Ves. 50.

The alteration and the interlineation appearing in this part of the will show plainly that there was deliberation upon the subject. The testator could hardly have made the alteration and interlineation without the sum which would be required to double the legacies having passed through his mind. He does not say that the 4100*l.* will actually double the legacy to his relations, but that it will "just" double it. Some meaning he must have attached to the word "just." What that meaning was he has left us to conjecture. He may have meant that it would nearly double the legacy, and the reference to the sum being to be divided in proportion to the legacies rather favours to this conclusion; although no great weight can be attached to it, as the direction for a proportionate division would in no event be inappropriate, there being a gross sum to be divided among several persons. Looking to all the circumstances of this very singular case, I cannot bring my mind to a judicial conclusion that there has been a clear mistake. I think it comes to be a doubt, and I adopt the rule in *Mellish v. Mellish*, that where it comes to be a doubt the safest way is to adhere to the words. I agree, therefore, with the Vice-Chancellor's conclusion upon this part of the case.

The other parts of the case have reference to the order made on the petition. Two of the testator's relations, legatees of 500*l.*, having died in the testator's lifetime, their shares of the 4100*l.*, unless going to their legal representatives by way of substitution, a point to which * I shall presently advert, must of course have lapsed; and it was contended on the part of the appellant, one of the testator's next of kin, that those shares did not form part of the residue belonging to the widow, but that the 4100*l.* being, as it was said, excepted from the residue, devolved to the next of kin, as in the case of intestacy. I think, however, that this point cannot be maintained. The 4100*l.* is given, not, as in the cases cited, as part of the residue, but by way of exception out of the residue: it is in effect a gift of 4100*l.* to the widow for life, with remainder to the legatees, and the shares of those who died would therefore fall into the residue. A more plausible claim to a share of the 4100*l.* was advanced by Mr. Little on behalf of the next of kin of a sister, a legatee of 500*l.*, who died in the testator's lifetime; but this claim rests wholly upon there being a gift by way of substitution to the next

of kin, and whatever may be the effect of the words "or to their legal representatives," as applied to the original legacies to the brothers and sisters, as to which I give no opinion, I do not think that those words extend to or affect the disposition of the 4100*l.*, with which alone we have now to deal. In my opinion, therefore, both the orders of the Vice-Chancellor are correct, and these appeals must be dismissed, but I think they should be dismissed without costs.

* In the Matter of JAMES CANT'S ESTATE, * 503
and

In the Matter of The LANDS CLAUSES CONSOLIDATION ACT, 1845, and of the EASTERN UNION and HARWICH RAILWAY and PIER ACT, 1847.

1859. July 8. Before the LORDS JUSTICES.

Land was devised in trust for the testator's widow for life, and after her death for sale and division of the proceeds among his children equally, with a direction that the trustees should offer the land to the testator's son, at a specified price, upon the death of the widow. The land was purchased by a railway company, under the powers given by their Act, for more than twice the specified sum. *Held*, that the son was entitled to the difference.

THIS was an appeal from the order of Vice-Chancellor STUART, upon a petition under the above Acts.

The question arose upon the will of James Cant, dated the 27th of January, 1827, whereby, after appointing his wife Hannah Cant (since deceased), his son George Long Cant and his son-in-law James Wright (since deceased), executrix and executors of his will; he gave all his estate both real and personal, whatsoever and wheresoever and of what nature or kind soever (subject to the payment of his mortgage securities, if any), to his said executrix and executors, to hold the same to them his said executrix and executors, their heirs, executors, or administrators, upon trust to permit the testator's wife to receive the rents of such part of his property as should consist of real estate, and the interest of such part of his personal property as should be in the funds or on other securities; and within four months after her decease he

directed George Long Cant and James Wright, or the survivor of them, his heirs, executors, or administrators, to stand possessed of all his said estates both real and personal, in trust to sell the whole thereof and to divide the proceeds into ten equal parts, and when so divided, he gave one-tenth part thereof to his * 504 daughter Mary * Ann, one other tenth part to George Long Cant, and the eight other tenth parts to his eight other children. The will also contained the following proviso: "Provided always, nevertheless, and my mind and will is, that the said George Long Cant and James Wright, or the survivor of them, or the heirs, executors, or administrators of such survivor, previous to selling and disposing of the garden purchased of the assignees of John Golding, and also the garden formerly Mr. Burton's, shall offer both the said gardens to my said son Charles Cant at the sum of 450*l.*; and shall also offer the house and bake-office now in the occupation of my son William Cant, in Lamford, to my said son William Cant, at the sum of 200*l.*; and if either my said son Charles Cant shall be desirous of purchasing my said gardens at the sum of 450*l.*, or my said son William Cant shall be desirous of purchasing my said house and bake-office at the sum of 200*l.*, and shall each of them or either of them give to the said George Long Cant and James Wright, or the survivor of them, or their heirs, executors, or administrators of such survivor, three calendar months' notice in writing (such three calendar months' notice to be computed from one calendar month next after the decease of my said wife) of such his or their desire to purchase, then on payment of the respective purchase-moneys or of the purchase-money of such of my said sons as shall have so given notice of his intention to purchase at the expiration of such notice or notices, I do hereby direct the said George Long Cant and James Wright to stand possessed of the said garden and bake-office, in trust to convey the same to either of my said sons Charles Cant and William Cant, or such of them from whom they shall receive such notice as aforesaid, and in the event of their not receiving such notice or notices as aforesaid, or of the purchase-money or purchase-moneys not being paid or ready to be paid at the expiration of such notice or notices, then that * 505 the said * George Long Cant and James Wright, or the survivor of them, or their heirs, executors, or administrators of such survivor, shall stand possessed of the said garden,

house, and bake-office in trust to be sold in manner hereinbefore directed."

The testator died on the 13th of July, 1828.

In the year 1853, notice was given by The Eastern Union Railway Company of their intention, by virtue of their several Acts of Parliament, to take the gardens and some cottages which the testator had built in them, for the purposes of an extension line of railway to Harwich, and thereupon the company contracted with Hannah Cant, as the person entitled to the receipt of the rents and profits of the premises, as tenant for life for the absolute purchase of the cottages and gardens for 1250*l.*, which was on the 12th of July, 1853, paid by the company into the Bank of England, in the name of the Accountant-General.

A sum of 820*l.* cash, being the residue of the 1250*l.* after payment of a mortgage debt, was in pursuance of an order of the 12th of June, 1854, laid out in the purchase of 882*l.* 18*s.* 2*d.* consols, and the dividends were paid to Hannah Cant for her life.

She died on the 27th of January, 1859, leaving the petitioner George Long Cant the sole surviving executor and trustee of her husband's will, James Wright having died in 1856.

On the 5th of February, 1859, Charles Cant gave notice in writing to George Long Cant that he was desirous of purchasing the gardens and hereditaments mentioned in the will, and that as they had been purchased * by the railway company * 506 he claimed the purchase-money on payment of the 450*l.*, the price specified in the will.

George Long Cant, and an incumbrancer on his share, presented the petition on which the order under appeal was made, praying for the transfer of the fund in Court and its distribution among the surviving children and the representatives of the deceased children, and the Vice-Chancellor so ordered.

The case is reported in the 1st volume of Mr. Giffard's Reports. (a)

Mr. D. L. Giffard and *Mr. Millar*, for the appellant Charles Cant. — The interest of the appellant in the land under the pre-emption clause was not affected by the operation of the railway Act, which could not alter the rights of the parties. If a rail-

way company took land contracted to be sold, the purchaser would be entitled to the benefit of the contract, and this was the same thing in substance. The testator only intended the other children to have nine-tenths of the 450*l*.

They referred to *Earl of Radnor v. Shafto*. (a)

Mr. Shebbeare, for the original petitioners. — The object was, that Charles Cant might use the land for the purpose of his business as a gardener, but the land having been taken by the company before the period arrived for selling it under the will, the testator's intention became incapable of being carried into effect.

* 507 * *Mr. H. F. Shebbeare*, for the children of the testator other than the appellant Charles Cant. — The testator meant to benefit his children equally, and to give Charles Cant a double share would defeat this intention.

Ex parte the Precentor of Saint Paul's (b) was also referred to.

Mr. Giffard, in reply.

THE LORD JUSTICE KNIGHT BRUCE. — By a contract of purchase under the powers of a railway Act, a sum of money was substituted for land and became subject to all the rights which affected the land. The land had been devised with other property by the owner to his wife for life, and after her death all was to be sold, and the testator in effect said, "as to a particular portion," namely, the land now in question "my son shall have it if he shall elect to be charged for it with 450*l*. as between himself and my estate." I conceive that this right remains not affected by the Act, and that the son is entitled to take the purchase-money, whether amounting to hundreds or thousands, on paying the sum which the testator has specified in his will, just as he would have been entitled to the land itself if it had not been taken by the railway company.

THE LORD JUSTICE TURNER. — The whole argument of the

(a) 11 Ves. 448.

(b) 1 K. & J. 538.

respondents rests on this, that the testator only intended to benefit his son Charles, in the event of his continuing to be a gardener. The *true test of this argument is, * 508 whether, if he had ceased to be a gardener in his father's lifetime he would still have been entitled to the land. This question admits of no doubt, and the only consideration then is, whether, if the right remained at the death of the testator, the Act of Parliament subsequently passed can affect it. I am of opinion that it cannot.

The order of the Court below must therefore be reversed, and an order must be made declaring, that Charles Cant paying 450*l.* to the credit of the general estate of the testator is entitled to the money paid into Court by the company. The costs of all parties of the appeal must be paid out of the estate of the testator.

DIXON v. WILKINSON.

1859. April 18, 19, 27. July 8. Before the LORDS JUSTICES.

The Court will not, in the exercise of its summary jurisdiction over solicitors, call upon a solicitor to account for moneys received by him, where they were received by him not in the character of solicitor to the person making the application, but of solicitor to another person.¹

D. was solicitor to the plaintiff in a cause, and also to the receiver, and the receiver was in the habit of remitting the rents to him. *Held*, that D. must be considered to have received the rents as solicitor or agent of the receiver, and that the plaintiff could not call upon him to account for them under the summary jurisdiction.²

Assuming the Court to have jurisdiction to make a solicitor answerable for losses occasioned to his client by mere ignorance, mistake, neglect, or mismanagement, apart from fraud or malfeasance, the Court has a discretion as to exercising or declining to exercise that jurisdiction, according to the circumstances of each particular case.

Per the Lord Justice TURNER. *Semble*, the Court has such a jurisdiction.

THIS was an appeal by the plaintiff from a decision of Vice-Chancellor KINDERSLEY, declining to make any order upon a

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1841.

² See *Adams v. Woods*, 8 Cal. 319; *Ryckman v. Parkins*, 5 Paige, 543; *Kerr Receivers* (1st Am. ed.), 208, 211, 230, note (1).

petition presented by her for the purpose of charging Messrs. Dean, Leeks, & Redpath, solicitors, with money alleged to have been lost through their neglect and mismanagement.

* 509 * The suit was instituted for the administration of the estates of Edward and Elizabeth Dixon, the father and mother of the plaintiff, and for the appointment of a guardian and receiver. Edward Dixon died intestate in August, 1834; the plaintiff was born in November in the same year, and Elizabeth Dixon died in December, 1834, after having taken out administration to her husband's estate. She left a will bequeathing her property to the plaintiff, and appointing Elizabeth Langhorne and W. H. Langhorne her executors, who proved her will soon after her death. On the 9th of February, 1835, letters of administration *de bonis non* of Edward Dixon were granted to Elizabeth Langhorne. The plaintiff was also entitled to a share of real estate which had been devised to her father as tenant in tail by the will of his uncle Robert Henry Macdonald, who had died in 1831. The will was filed on the 2d of July, 1835, pursuant to instructions from Mr. Robert William Dixon, the plaintiff's uncle, who acted as her next friend, and the solicitors employed were Robert Owen and James Henry Dixon, then carrying on business in partnership.

In August, 1836, an order was made referring it to the Master to approve of a guardian and an allowance for maintenance, and for payment into Court of a sum of 300*l.*, and for investment and accumulation. This sum accordingly was paid in and invested in the purchase of 327*l.* 17*s.* 5*d.* consolidated bank annuities. On the 6th of November, 1837, a Mr. Rampling was appointed receiver of the rents of the plaintiff's real estates, Robert W. Dixon and James Henry Dixon being his sureties. In December, 1837, a report was made approving of Samuel Dixon, the plaintiff's grandfather, as guardian, and allowing 45*l.* per annum for maintenance out of the rents of the real estate. On the 23d of February, 1838, an order was made confirming this report, and directing the receiver to pay the balances into Court.

* 510 * In 1840 the partnership of Owen and Dixon was dissolved. Owen went abroad, and Dixon entered into partnership with Dean and Creasy. The firm of Dean, Creasy, & Dixon then became solicitors for the plaintiff in this suit.

On the 24th of July, 1840, a decree was made for the administration of the personal estates of Edward Dixon and Elizabeth Dixon. In the same year Elizabeth Langhorne died. In April, 1842, James Henry Dixon took out administration to the estate of Edward Dixon, a supplemental bill was filed, and in the same month the common supplemental decree was made.

On the 10th of May, 1843, the Master made his general report, but nothing further was done in the cause for several years. In the early part of the year 1846, Leeks and Redpath entered into partnership with Dean and Dixon, Creasy retiring, and the business was continued under the firm of Dean, Leeks, Dixon, & Redpath. In July, 1848, Dixon withdrew from the business, which was continued by Dean, Leeks, and Redpath. Leeks, it appeared, never was personally concerned in the suit, but Redpath took some part in the conduct of it.

On the 26th of January, 1849, an order on further directions was made, directing, among other things, payment of debts with subsequent interest, but no substantial step was ever taken under this order beyond taxing the costs thereby directed to be taxed.

In February, 1852, the partnership of Dean, Leeks, & Redpath was dissolved, and upon the dissolution the papers connected with the suit were handed over to Dean, who neglected the prosecution of the suit to such * a degree * 511 that the Master, in 1857, made a report, the substance of which was, that owing to Dean's defaults he was unable to proceed with the matters referred to him by the order on further directions. In November, 1855, the plaintiff attained her majority. In August, 1857, Dean absconded in a state of insolvency, and was shortly afterwards made bankrupt.

It appeared that none of the dividends arising from the 327l. 17s. 5d. consols had ever been invested in pursuance of the order for accumulation. It further appeared that sums had been remitted to Mr. Dean or his firm on account of the rents of the real estates during the plaintiff's minority, which had not been accounted for. Down to 1845 these remittances to Dean or his firm were made by Rampling the receiver, who employed the firm as his solicitors in passing his accounts. In 1845 Rampling ceased to receive the rents, and it was arranged that Robert William Dixon should receive them without remuneration, and

he accordingly thenceforth acted as receiver, but no application was made to the Court on the subject. Rampling continued nominally to be receiver, and the accounts were made out and passed by the firm in his name, and were sworn to by him. Robert William Dixon was in the habit of remitting the rents as he received them to Dean. Owing to the neglect to carry on the suit properly, the debts had not been paid, and interest upon them had been running at the rate of 4*l.* per cent, while the fund in Court had been producing little more than 3*l.* per cent.

The plaintiff, in 1858, presented this petition, praying, among other things, that Messrs. Dean, Leeks, & Redpath, or some or one of them, might be declared to be liable for and directed to

make good all the rents and profits of the plaintiff's estate
* 512 from time to time remitted * by the receiver or Mr. Robert

William Dixon to the firm of Dean, Leeks, & Redpath, or to Dean on behalf of the firm, from the time of the formation of such firm down to its dissolution, with interest on such sums from the respective times when the same were remitted—and might be charged from the year 1846 to the present time with the difference between the interest payable on the funds in Court and the interest payable on the unpaid debts of Edward Dixon—that they might in like manner and for the like period be charged with the loss which had accrued to the plaintiff by reason of the non-investment of the dividends of the 327*l.* 17*s.* 5*d.* bank annuities; and that an account might be taken of any other damage or loss sustained by the plaintiff by reason or in consequence of the negligence of Dean, Leeks, & Redpath in the non-prosecution of the suit, and for payment accordingly.

Before this petition was presented, Messrs. Leeks and Redpath offered to pay the plaintiff 47*l.* 5*s.* 8*d.*, being the difference between the amount of remittances to Mr. Dean, as made out on behalf the plaintiff, and the amount estimated by them as due for costs. This offer was not accepted.

Vice-Chancellor KINDERSLEY dismissed the petition. His Honor held that the remittances to Dean and his firm must be considered as made to them in the character, not of solicitors to the plaintiff, but of solicitors to the receiver, and that the plaintiff had no right to obtain an account against them in a summary way. As to the neglect and mismanagement of the suit, his

Honor considered that there had been very gross negligence, but thought that he had no jurisdiction to give relief in a summary way for negligence however gross. The plaintiff appealed.

**Mr. Anderson and Mr. W. Rudall*, for the appellant. — * 513
There is no doubt of the jurisdiction of this Court to order a solicitor to pay over money received by him in that character, or to make compensation for loss occasioned by his misconduct. A familiar instance of the latter exercise of jurisdiction is where a solicitor institutes a suit without authority. In such a case he is ordered to pay personally all the costs. *Allan v. Bone*. (a) In order to found the summary jurisdiction as to moneys received, it is not necessary to show that the moneys were received from the client, it is enough that they were received on behalf of the client. *Ex parte Wortham*. (b) One of your Lordships there said, “In my judgment the relation and connection between them, which, existing when the respondent received the 550*l.* from Mr. Withall, did therefore at one time exist with respect to the respondent’s possession of this sum, have never been so destroyed or dissolved as to exempt him from that summary jurisdiction respecting the money to which immediately after receiving it he was unquestionably liable.” Nor is it necessary that there should be personal misconduct. *Re Lawrence, Crowdy, & Bowlby*, (c) which may be cited against us, proceeded on the ground that the client had so acted as to deprive himself of the right against all the members of the firm “to which he would otherwise have been entitled.” *Re Aitkin* (d) shows that it is sufficient if the transaction took place in consequence of one of the parties filling the character of attorney. The Vice-Chancellor in the present case held himself bound by authority as to the question of jurisdiction in the case of negligence, but the cases do not negative the existence * of jurisdiction to make a solicitor re- * 514 sponsible in a clear case of gross negligence. *Frankland v. Lucas*, (e) *Rex v. Tew*, (g) *Rex v. Bennett*, (h) *Mordecai v. Solo-*

(a) 4 Beav. 493. See also *Crossley v. Crowther*, 9 Hare, 384; *Atkinson v. Abbot*, 3 Drew. 251.

(b) 4 De G. & Sm. 415.

(c) 2 Sm. & Giff. 367.

(d) 4 B. & Ald. 47.

(e) 4 Sim. 586.

(g) Sayer, 50.

(h) Sayer, 169.

mon, (a) *Meggs v. Binns*, (b) *Floyd v. Nangle*, (c) *Wood v. Wood*, (d) *Norton v. Cooper*, (e) *Re Becke*. (g) Gross negligence, though not amounting to fraud, is sufficient to evoke the jurisdiction of the Court. There are cases in which the remedy, by the exercise of summary jurisdiction, was refused at law, but they were cases of mistake in pleading, or of mere delay in proceeding. *Barker v. Butler*, (h) *Pitt v. Yalden*, (i) *Fowler v. Windsor*. (k) [Their Lordships sent for the registrar's book, from which it appeared that the petition in *Fowler v. Windsor* appeared to have been dismissed.] But it is otherwise in a case of *crassa negligentia*. *De Rouffigny v. Peale*, (l) *Clarke v. Gorman*. (m) The respondents relied on *Tylee v. Webb*, (n) but that authority does not apply to the present case, for there, although the respondent was a solicitor, he was not the solicitor of the petitioner, but was a mere stranger as regarded the payment of the money to him. *Re Barnard*, (o) decided on the same day, is more in point on the question of jurisdiction. The suit has been so conducted as to disentitle the solicitor to costs. *Stokes v. Trumper*. (p) There was no excuse for non-payment of the debts and non-investment of the dividends. It was argued that there was no instance in which, before the passing of the new Act, this Court could give damages, but this is too extensive a proposition. *Phelps v. Prothero*. (q)

* 515 * *Mr. Glasse and Mr. Hislop Clarke*, for Messrs. Leeks and Redpath. — As to the remittances, we submit that there is no liability on our clients' part except for the few sums which passed through the books of the firm; as to the other sums, they were not aware of Dean's receipt of them, and are not liable for them. It was no part of the duty of the firm to receive these moneys, nor to see that the receiver paid his balances into Court, and the receipt of them by one partner without the knowl-

- (a) Sayer, 173.
- (b) 2 Bing. N. C. 625.
- (c) 3 Atk. 568.
- (d) 4 Russ. 558.
- (e) 3 Sm. & G. 375.
- (g) 18 Beav. 462.
- (h) 2 Wm. Bl. 780.
- (i) 4 Burr. 2060.

- (k) 4 Burr. 2060, n. (3d ed.).
- (l) 3 Taunt. 424.
- (m) 3 Taunt. 492.
- (n) 14 Beav. 14.
- (o) 14 Beav. 18.
- (p) 2 K. & J. 232.
- (q) 7 De G., M. & G. 722.

edge of the others cannot make them liable. *Harman v. Johnson*. (a) This case is not like *Blair v. Bromley*, (b) where money was actually paid to the joint account of two partners on behalf of a client. There both were held liable for the misapplication of the money, but in this case Deane had no authority to receive the moneys on account of the firm. *Ex parte Dufaur*. (c) At all events we cannot be made to account for them on petition. *Ex parte Wortham* (d) was not a case of mere constructive liability. *Re Lawrence, Crowdy, & Bowlby* (e) is in our favour. *Re Aitkin* (g) goes to the extreme verge of the law, and is observed upon in *Re Webb*. (h) Moreover the money was there received actually and personally, and not merely constructively. *Wood v. Wood* (i) does not extend to charging innocent partners.

Then as to negligence; the Court has no jurisdiction even on bill to make solicitors liable for negligence. The case of *Allan v. Bone*, (k) and the other authorities of that description, were not cases of negligence, but of * officers of the Court * 516 taking upon themselves to act without authority. The observation in *Floyd v. Nangle* (l) is a mere *dictum*, and the case is not to be found in *West*. No order was made. The cases on the whole are in our favour. *Fawkes v. Pratt*, (m) *Ex parte Jones*, (n) *Brooks v. Day*, (o) *Luke v. Bridges*, (p) *Brasier v. Briant*. (q) The cases in Sayer are very loosely reported and have not been followed; *Meggs v. Binns* (r) is no authority for a petition; *Norton v. Cooper* (s) goes on a special principle; *Becke's Case* (t) was not a case of negligence; *Barker v. Butler* (u) and *Mordecai v. Solomon* (v) are in our favour; *De Roufigny v. Peale* (w) was not under the summary jurisdiction, nor was *Clarke v. Gorman*; (x) *Stoker v. Trumper* (y) was altogether a different

(a) 2 El. & Bl. 61.

(b) 5 Hare, 542; 2 Phil. 354.

(c) 2 De G., M. & G. 246.

(d) 4 De G. & Sm. 415.

(e) 2 Sm. & Giff. 367.

(g) 4 B. & Ald. 47.

(h) 14 Law J., N. S., Q. B. 244.

(i) 4 Russ. 558.

(k) 4 Beav. 493.

(l) 3 Atk. 568.

(m) 1 P. Wms. 592.

(n) 1 Chit. 651.

(o) 2 Dick. 572.

(p) Prec. in Ch. 146.

(q) 2 Dowl. Pr. Cas. 600.

(r) 2 Bing. N. C. 625.

(s) 3 Sm. & G. 375.

(t) 18 Beav. 462.

(u) 2 W. Bl. 780.

(v) Sayer, 173.

(w) 3 Taunt. 424.

(x) 3 Taunt. 492.

(y) 2 Kay & J. 232.

case, and only decided that the costs of useless proceedings will be disallowed; *Tylee v. Webb* (a) is strongly in our favour. In order to make the application maintainable it must be made by the party who paid the money. *Re Fenton*, (b) — v. *Jolland*, (c) does not support the view that the remedy can be had in a summary way; all that Lord ELDON there said was this: "I will not say now what would be the decision upon the question whether the receiver should not make good any loss occasioned. But it would at least be a very grave question. So also to the solicitor who should permit such a transaction." The transaction suggested was a loss to the estate from a fall in the funds.

* 517 The * words ascribed to Lord ELDON were, at the utmost, an *obiter dictum*, and nothing is said in them as to the nature of the proceeding against the solicitor, nor as to the mode in which the jurisdiction would be exercised. *Chater v. Maclean* (d) is almost on all fours with this case. There was not any negligence on the part either of Leeks or Redpath, nor was any claim made against them on that ground before the petition was presented.

Mr. Anderson, in reply, referred to *Ridley v. Tiplady*, (e) as to the disallowance of the costs, on the ground of the improper delay in the prosecution of the suit.

Judgment reserved.

July 8.

THE LORD JUSTICE KNIGHT BRUCE. — The petition in this cause, of which we are now to dispose, is one of appeal or rehearing, presented by the plaintiff. It complains of the dismissal, in March, 1859, by one of the learned Vice-Chancellors, of a former petition in the cause, which, presented by her in June, 1858, and supported and opposed by no small body of evidence, was, after a full argument, dealt with as I have said. We have accordingly had to consider both petitions, which were fully and satisfactorily argued before us in Easter Term last. The relief, however, asked here by the petitioner through her counsel was confined to

(a) 14 Beav. 14.

(d) 3 Weekly R. 261.

(b) 5 Nev. & M. 239.

(e) 20 Beav. 44.

(c) 8 Ves. 72.

relief against the respondent Mr. Leeks and the respondent Mr. Redpath, gentlemen who had been two of her solicitors in the cause during part of her minority, in respect of money alleged to have been received on her * account by them as * 518 her solicitors or agents, and in respect of alleged negligence and mismanagement imputed by her to them. As to the alleged receipts, his Honor, as I understand, held that they were not on the plaintiff's account, and as to the imputed negligence and mismanagement he thought, as I collect, that there was no jurisdiction in the Court to make such an order as was asked.

The suit was commenced by an original bill filed in the year 1835, soon after the plaintiff's birth, which took place in November, 1834, and the death of her surviving parent in the same year. The plaintiff's next friend in the cause, from the beginning and throughout to the end of her minority in November, 1855, was her uncle Mr. Robert William Dixon, who is still living. The cause was heard and a decree made in 1840. The general report was in 1843, previously to which, but after the decree, she had by the same next friend filed a bill of revivor and supplement against another uncle Mr. James Henry Dixon; that bill was a mere continuance of the original cause, of which the object was the protection and administration of some real estate belonging to the plaintiff, and her interest in the respective personal estates of her father and mother. Very soon after the filing of the original bill a receiver of the rents of the plaintiff's real estate was appointed in the cause. The receiver who thus appointed in the first instance continued so until a time subsequent to March, 1852, and therefore during more than fifteen years, was Mr. Rampling, an uncle-in-law, I believe, of the plaintiff; his sureties were Mr. Robert William Dixon and Mr. James Henry Dixon, both already mentioned, and both, I believe, gentlemen now and uniformly in good circumstances, though the latter is said to be resident on the continent of Europe.

* During some years after, though not immediately after * 519 Mr. Rampling's appointment, Mr. Robert William Dixon acted for him practically as receiver; the plaintiff's maintenance was provided for, it appears, out of her rents, which were not exhausted by it. The cause was heard on further directions in the year 1849. The order then made seems erroneous, and the cause indeed, from a very early period, seems on the part of the

plaintiff's solicitors for the time being to have been neglected and mismanaged to her material prejudice, especially in respect of her rents, the receivership, and the debts proved under the decree, which have not yet been paid.

The prayer of the dismissed petition extends to one Mr. Thomas Dean as well as to Messrs. Leeks and Redpath; but Mr. Dean, who was from the 1st of January, 1846, to the end of February, 1852, their partner, and was, during that time and longer, one of the plaintiff's solicitors in the cause, absconded in August, 1857, in a state of insolvency, was adjudicated a bankrupt in September, 1857, and has not since he absconded been forthcoming; he is therefore a party to the petition only in name, though liable, I suppose, certainly not less than Messrs. Leeks and Redpath, to the plaintiff. That prayer, so far as at present material, is this: [His Lordship here read the material parts of the prayer.] Now, the solicitors by whom the cause was originally instituted in 1835, under Mr. Robert William Dixon's instructions, were Mr. Robert Owen and his then partner Mr. James Henry Dixon, more than once already alluded to, the brother of the next friend. The subsequent devolutions of the solicitorship may be collected from an affidavit sworn in the cause by the respondents Mr. Leeks and Mr. Redpath, on the 24th of July, 1858, from which I will read some passages. [His

* 520 Lordship * here read passages showing the changes of solicitorship, the substance of which is given above.] It is observable, then, that at the end of February, 1852, both Mr. Leeks and Mr. Redpath ceased finally to be solicitors for the plaintiff, neither of them having been her solicitor before the year 1846, and that she attained her majority in November, 1855, which was more than eighteen months before the absconding of Mr. Dean, and more than two years before the presentation of the petition dismissed by the Vice-Chancellor. It must be added that not any fraudulent act nor any fraudulent design is proved against Mr. Leeks and Mr. Redpath, or either of them, whatever amount of negligence or mismanagement there may have been, and to whomsoever attributable. Certainly they do not nor could deny having been two of the plaintiff's solicitors in the cause from the commencement of the year 1846 to the end of February, 1852, employed by her next friend; nor for the mere purpose of civil liability to a client can it generally be material

which of a firm of solicitors employed by the client is active and which inactive.

To deal first with the relief asked on the ground of negligence and mismanagement (independently of the question of liability for money received), a ground as to which I have already said the Vice-Chancellor considered himself to be without jurisdiction. If a jurisdiction in this Court, of the kind and to the extent for which the plaintiff contends, exercisable as she alleges, does in truth exist, the Court is not, I apprehend, bound to act on it *ex debito justitiæ*, whenever a solicitor has in the conduct of a suit here damaged his client by ignorance, mistake, neglect, or mismanagement. There must, I conceive, be a discretion in the Court as to exercising or declining to exercise the jurisdiction according to the circumstances of each particular instance where there is *no fraud, if, in the absence of fraud, *521 there is such a jurisdiction. Here, we must recollect how many years the cause had been in existence, how far it had proceeded, and in what condition it was when Mr. Leeks and Mr. Redpath became first Mr. Dean's partners. The general report had been made in 1843, and if the order on further directions made in 1849 was erroneous, we have not, I think, the means of saying that they are personally responsible for the error. We must recollect also that both the sureties for the receiver, who seems never to have been discharged and who was living after March, 1852, seem to be solvent. There being no fraud established against either Mr. Leeks or Mr. Redpath, each of whom ceased before March, 1852, to be a solicitor in the cause, it appears to me that, on the original petition before us, presented more than six months after the absconding of Mr. Dean, but more than two years after the plaintiff's majority, there should be no order with respect to neglect or mismanagement.

Then comes the question as to the receipts, which are of sums remitted to Mr. Dean or to his firm, in respect of the rents of the plaintiff's estate. These, to some extent at least, have not been accounted for, and if in my opinion they had been remitted to him or his firm in the character of her solicitor or solicitors, I think it probable that even as to those sums, of the transmission of which Messrs. Leeks and Redpath were altogether ignorant, I should have held them liable to account. But that I agree with the Vice-Chancellor in considering was not so. Those

remittances were, I think, made to Mr. Dean or his firm as the agent or agents of Mr. Robert William Dixon and Mr. Rampling, or of one of them. Nor is the plaintiff, I conceive, entitled upon such petitions as those now before the Court to charge

* 522 Mr. Leeks and * Mr. Redpath, in the character of her solicitors, with any part of them.

It is accordingly my opinion that the dismissal of the original petition ought to stand, but I shall have no objection to declaring in our order that the dismissal is to be without prejudice to any action against Mr. Leeks and Mr. Redpath or either of them, which the plaintiff or Mr. Robert William Dixon may be advised to bring, and without prejudice to any proceedings by the plaintiff or on her behalf against Messrs. Dixon or either of them. This the Vice-Chancellor himself very possibly, if asked, would have done. Provision should also, I think, be made for giving effect to the offer contained in Mr. Redpath's letter of the 21st of March last, stated in his affidavit of the 16th of April, an offer intended, I believe, by him unconditionally, to which as I understand he unconditionally adheres.

THE LORD JUSTICE TURNER. — I have but little to add in this case. I am of opinion that the Court has jurisdiction to charge solicitors with losses sustained by their clients from their misconduct in the prosecution of suits. Solicitors are officers of the Court, and must generally be responsible to it for the due discharge of the duties which they undertake. The Court has constantly exercised this jurisdiction in cases of malfeasance. Where, for instance, a solicitor has used the name of a party without authority, it is almost a matter of course to order the solicitor to pay the costs incurred by the party in consequence of his name having been so used. Whether this jurisdiction, which undoubtedly exists in cases of malfeasance, extends to cases of mere neglect, I think it is unnecessary for us in this case to

* 523 decide, but I am not * satisfied that in principle any sound distinction can be drawn between cases of malfeasance and cases of nonfeasance, and looking to what was said by Lord ELDON in *Jolland's Case*, (a) and to what I remember to have heard from him on some other occasion, though I cannot recollect or find the case, I strongly incline to the opinion that the juris-

(a) 8 Ves. 72.

diction is not limited to cases of malfeasance, but extends also to cases of mere neglect.

I think, however, that although the Court may possess this jurisdiction, the exercise of it must of necessity be rare, for the Court will not of course exercise it, unless it can do complete justice, and there are but few cases in which the measure of complete justice can be found. What is to be ascertained is the loss which the party has sustained; and, to take for an instance the dismissal of a bill through the neglect of a solicitor, — the case of *Frankland v. Lucas*, — (a) it must depend upon the plaintiff's case, whether the dismissal was a loss to him or not. The case may have been such that the further prosecution of the suit would have been detrimental and not beneficial to him, and I apprehend the Court would hardly try the merits of the case upon an application against the solicitor. Such cases must generally rest in damages, and would therefore be left to be tried at law.

In the case before us, I am of opinion that, assuming the jurisdiction to exist, we ought not to exercise it. As to the rents, it does not appear that the plaintiff will sustain any loss. She has the sureties to resort to. As to the further prosecution of the suit, there is the decree of the Court, and solicitors ought not, I think, to be made answerable for what the Court has done by its decrees, unless, indeed, there be special circumstances going far * beyond what appears in this case. As * 524 to the non-payment of the debts and non-investment of the dividends, the loss which alone the plaintiff can claim against the present respondents is so inconsiderable, that I think it would be a mischievous precedent to give relief in this respect upon such a petition as this, and as to the general account of loss and damage, it is of course out of the question.

I have read with very great dissatisfaction the enormously long affidavits which have been filed in this case, and having regard to the offer made by the respondents before this appeal was lodged, I have doubted much whether the appeal should not be dismissed with costs; but upon the whole, looking to the grounds on which the Vice-Chancellor proceeded, and to his opinion upon the case, I think the proper order will be to dismiss the appeal without costs.

1859. July 2, 9. Before the Lord Chancellor Lord CAMPBELL and the LORDS JUSTICES.

A vendor being entitled under a limitation to uses to bar dower, without a power of appointment, the purchaser insisted on the concurrence of the dower trustee. The trustee being abroad, the vendor filed a bill to enforce specific performance, without his being a party to the conveyance. The Vice-Chancellor held, that the objection was well founded, and made a decree for specific performance, with an order vesting the estate of the dower trustee in the purchaser upon the execution of the conveyance by the vendor; but considering the objection, though tenable, to be frivolous and vexatious, he gave no costs to either party.

Held, on appeal by the purchaser, that the objection was frivolous and vexatious, and ought not to have been insisted on; and that costs ought not to be given to the purchaser. Whether it was a tenable objection, *quære*.

THIS was an appeal by the executors of a purchaser from part of a decree for specific performance and from an order on further consideration.

The only question which gave rise to the suit was one of conveyance, namely, whether the concurrence of a dower trustee was requisite. By an indenture dated the 20th of December, 1841, the property in question was limited to the plaintiff and his assigns for his life, without impeachment of waste, with remainder to G. J. Pitman and his heirs during the life of the plaintiff, in trust for the plaintiff and his assigns, with remainder to the plaintiff, his heirs and assigns, the power of appointment commonly inserted in limitations to bar dower being omitted. The plaintiff in March, 1857, contracted to sell to the defendant, the sale to be completed at Michaelmas, 1857. The defendant refused to complete unless G. J. Pitman concurred in the conveyance. Pitman being in Australia, the vendor declined to procure his concurrence, and filed his bill to enforce specific performance without it.

The Vice-Chancellor held, that the objection of the purchaser was frivolous and vexatious, but technically well founded, * 526 and made a decree dated the 8th of March, * 1858, directing an account of what was due to the plaintiff for pur-

chase-money and interest, regard being had to any rents that might in the mean time have been received by the plaintiff, and also to such occupation rent as he might properly be charged with. The decree then proceeded to direct a conveyance upon payment of what was found due. And it was declared that upon the execution of the conveyance the defendant would be entitled to have such estate as was then vested in G. J. Pitman, vested in himself, and it was ordered that the estate and interest of Pitman should, on the execution of the conveyance by the plaintiff, vest in the defendant, his heirs and assigns, for the estate of Pitman therein. No costs were given up to the hearing, but subsequent costs were reserved.

The chief clerk calculated the interest on the purchase-money from Michaelmas, 1857, to the 6th of April, 1858, and deducted the rent received by the plaintiff from the tenant of such part as was let. As to the rest, it was decided by the Vice-Chancellor in Chambers, that the plaintiff, not having been in any beneficial occupation thereof since Michaelmas, 1857, was not properly chargeable with any occupation rent. This part consisted of a dwelling-house and grounds, which were the residence of the plaintiff till Michaelmas, 1857, and were afterwards occupied by a person whom he put in to keep them.

On the 12th of November, 1858, the cause was heard for further consideration, and it appearing that the conveyance had been executed and the principal of the purchase-money paid on the 6th of April, 1858, the defendant was ordered to pay the balance of interest found due as above and the plaintiff's costs subsequent to the decree.

* The defendant having died a few days afterwards, his * 527 executors revived the suit, and appealed against so much of the decree as authorized the giving the plaintiff interest on the purchase-money from an earlier day than the execution of the conveyance, and as gave the defendant no costs up to the hearing, and against the whole of the order on further directions.

Mr. Craig and *Mr. Southgate*, for the appellant. — We submit that we ought to have costs, as our objection has been decided to have been well founded.

[THE LORD CHANCELLOR. — Why were you refused them?]

The Vice-Chancellor said that the objection, though well founded, was frivolous.

[THE LORD JUSTICE KNIGHT BRUCE. — Was he not right in so calling it? I am, for my part, disposed to think that it was no objection at all. If a tenant for life and his eldest son tenant in tail sell an estate, does a purchaser ever require the concurrence of the trustee to preserve contingent remainders?]

We submit that the objection was not frivolous. It is the practice of conveyancers to require the concurrence of the dower trustee when there is not any power of appointment (*a*). The vendor relies on Mr. Jarman's opinion given in this case. Mr. Lewin, another of the conveyancing counsel of the Court, is of the opposite opinion. (*b*) The plaintiff urges that, according to the present state of the law, a determination of the life-estate in the lifetime of the tenant for life is impossible. But the tortious operation of a feoffment was not done away with till the passing of the 7 & 8 Vict. c. 76, several years after the execution of this conveyance, so the whole life-estate may be vested in the trustee. Our objection, therefore, is substantial.

[*Mr. Malins.* — That argument proves too much. If the life-estate were forfeited by a feoffment, a power which is appurtenant to it would be gone, so that the concurrence of the trustee, if necessary here, would be necessary, if the usual power of appointment were inserted. Yet in that case conveyancers never require it.]

The purchaser is entitled to have an estate in fee-simple in possession conveyed to him, and this the vendor alone has not in him; if he had, his wife would be dowable. This case is one in which an appeal for costs will lie, *Norton v. Cooper*, (*c*) and here we have another point besides that of costs: we have been charged with interest, and are only to receive the rents of a small part of the property which is let. We ought to have the whole rental if

(*a*) Jarm. Byth. by Sweet, vol. 3, 255; 1 Sug. Pow. 233 (7th ed.).

(*b*) Lewin on Trusts, p. 596 (3d ed.).

(*c*) 5 De G., M. & G. 728.

we pay interest, (a) *Esdaile v. Stephenson*, (b) *Jones v. Mudd*. (c) We ought to have our costs both before and since the decree, as we have been decided to have been right in our objection.

Mr. Malins and *Mr. Karlake*, for the plaintiff, were not called upon.

THE LORD CHANCELLOR. — I regret extremely that so much expense has been occasioned, and so much of the time of the Court unnecessarily occupied, by this litigation. I think that the objection was a most frivolous and vexatious one, and that the defendant or his solicitor was much to blame for insisting on it. The Vice-Chancellor, in my opinion, came to a right conclusion in deciding that neither party should have his costs up to the hearing, and I think * that he also came to a * 529 right conclusion as to interest and rents. The appeal will be dismissed with costs.

THE LORD JUSTICE TURNER. — I am of the same opinion. This is a litigation about a point of no importance, and I think that neither party should have costs up to the hearing. I see no ground for excusing the purchaser from payment of interest.

THE LORD JUSTICE KNIGHT BRUCE. — This appeal is in my judgment frivolous and vexatious, and I agree entirely with the opinion of the Lord Chancellor and the Lord Justice, so far as it is against the appellant, but, with all deference to them, I should have been for giving the costs of the suit against the appellant.

Mr. Malins applied to be heard on the question of costs, but, on the Lord Chancellor intimating that it would require a very strong case to induce their Lordships to vary the decree on that point alone, he declined to argue the question.

(a) Sug. V. & P. 519 (13th ed.).

(c) 4 Russ. 118.

(b) 6 Madd. 367.

1859. July 8. Before the LORDS JUSTICES.

The proper time for an application under 15 & 16 Vict. c. 86, § 39, for an examination *vivâ voce* in Court, is at the hearing of the cause.

A MOTION was made before Vice-Chancellor KINDERSLEY, under the 15 & 16 Vict. c. 86, § 89, that some specified defendants might be ordered to attend at the hearing of the cause to be cross-examined *vivâ voce* on their affidavits, the section providing that, upon the hearing of any cause the Court, if it shall think fit so to do, may require the production and oral examination before itself of any witness or party in the cause. His Honor refused the motion, being of opinion that the discretion of the Court could not be properly exercised before the hearing, and that the application was, therefore, premature.

Mr. Haig now renewed the application before their Lordships. He submitted that the case was one in which cross-examination would be clearly necessary, and that it would only occasion useless expense to bring the cause on without the attendance of the defendants in question.

The Lords Justices agreed with the Vice-Chancellor, and declined to make any order. (a)

(a) See *George v. Whitmore*, 26 Beav. 557; *Peters v. Rule*, 28 L. J., Ch. 246; *Bradley v. Bevington*, 4 Drew. 511; *Bonsor v. Bradshaw*, 4 Jur., N. S. 1011.

* PHILLIPS v. GUTTERIDGE.¹

* 531

1859. July 11. Before the LORDS JUSTICES.

A deed was executed by a legal mortgagee of leaseholds, the executor of the mortgagor, and a new mortgagee, whereby in consideration of the payment by the new mortgagee of the old mortgage debt, the discharge of which the old mortgagee thereby acknowledged, and in consideration of a further advance to the executor of the mortgagor by the new mortgagee, the old mortgagee and the executor assigned the mortgaged premises to the new mortgagee, with a new covenant by the executor of the mortgagor for payment of the aggregate sum, and a new proviso for redemption. The deed contained no assignment of the old mortgage debt, but the operative words extended in the usual way to all the right and title of the old mortgagee in the premises. *Held*, that the old mortgage was not extinguished as far as regarded priority over a subsequent incumbrance.²

Where leaseholds were subject to a first mortgage, an annuity and subsequent incumbrances, and the rents were insufficient to keep down the interest on the first mortgage: *held*, that it was a proper case for an immediate sale at the first mortgagee's instance.³

THIS was the appeal of a defendant from the decree of Vice-Chancellor STUART, declaring that certain sums advanced upon mortgage had priority over an annuity to which the appellant was entitled, the question being whether the mortgages had been kept alive upon a new mortgage transaction, or had been paid

¹ S. C. 3 De G., J. & S. 332.

² See 2 Dart V. & P. (4th Eng. ed.) 839, 840. Where a promissory note secured by mortgage was given up, and the mortgagee accepted a recognizance for the sum due, it was held, that this did not discharge the mortgage, the condition of which was that the money should be paid. Nothing but payment of the debt will discharge the mortgage. *Davis v. Maynard*, 9 Mass. 242. The renewal of the note secured by a mortgage does not discharge the mortgage. *Watkins v. Hill*, 8 Pick. 522; *Pomroy v. Rice*, 16 Pick. 22; *Grimes v. Kimball*, 8 Allen, 518. Where the purchaser of an equity of redemption takes an assignment of the mortgage, it shall or shall not operate as an extinguishment of the mortgage, according as his interest may be, and according to the real intent of the parties. *Gibson v. Crehore*, 5 Pick. 150; 3 Pick. 475; *New England Jewelry Co. v. Merriam*, 2 Allen, 390; *Savage v. Hall*, 12 Gray, 383; *Hunt v. Hunt*, 14 Pick. 374; *Brown v. Lapham*, 3 Cush. 551.

³ See 2 Dart V. & P. (4th Eng. ed.) 1080; *Foster v. Harvey*, 12 W. R. 92 L. JJ.

off and merged in the equity of redemption, so as to give the annuity priority.

By an indenture dated the 16th of August, 1820, made between James Gutteridge of the one part, and Jane Mason, widow, of the other part, ten leasehold houses were assigned to Jane Mason, her executors, administrators, and assigns, for the then residue of a term of eighty-eight years, subject to redemption on payment by James Gutteridge to Jane Mason of 400*l.* and interest.

By another indenture dated the 4th of August, 1827, and made between Thomas Folds and Thomas Westwood of the first part, James Gutteridge of the second part, and Henry Thomas Parkes of the third part, in consideration of 300*l.* to Thomas Folds * 532 and Thomas Westwood, * paid by Henry Thomas Parkes at the request of James Gutteridge, other houses in the parish of St. Martin, Birmingham, were assigned to Henry Thomas Parkes, his executors, administrators, and assigns, for the then residue of a term of 106 years created by a lease of the 1st of August, 1791, subject to redemption on payment by James Gutteridge, his executors, administrators, and assigns, to Henry Thomas Parkes, of 300*l.* and interest.

James Gutteridge died in 1828, having by his will dated the 29th of November, 1827, bequeathed unto William Probert, since deceased, and Thomas Gutteridge, their executors and administrators, all the above-mentioned houses, upon trust to pay an annuity of 60*l.* per annum unto his the testator's daughter, the appellant Harriett Gutteridge, for her life, with ulterior dispositions of the annuity not material to be stated, and a residuary bequest in favour of Thomas Gutteridge.

By an indenture dated the 30th of January, 1840, and made between the executors of Jane Mason (who had died) of the first part, Henry Thomas Parkes of the second part, Thomas Gutteridge of the third part, and Catherine Phillips of the fourth part, reciting that there was then due to Mrs. Mason's executors upon the mortgage of the 16th of August, 1820, 400*l.* only, and to Henry Thomas Parkes on the mortgage of the 4th of August, 1827, 300*l.* only, and also reciting that Thomas Gutteridge had occasion to borrow the sum of 500*l.*, and had requested Catherine Phillips as well to pay off and discharge the 400*l.* and 300*l.*, as also to lend him the further sum of 500*l.*, making together the sum of 1200*l.*, which she had agreed to do upon having an assign-

ment of the leasehold premises made to her for securing the repayment thereof with interest in manner thereafter * mentioned, it was witnessed, that in consideration of * 533 400*l.* paid to Mrs. Mason's executors, and of 300*l.* paid to Henry Thomas Parkes by Catherine Phillips, at the request of Thomas Gutteridge, the receipt whereof Mrs. Mason's executors and Henry Thomas Parkes thereby acknowledged, and declared the same to be in full satisfaction and discharge of all principal money and interest due under and by virtue of the indentures of the 16th of August, 1820, and the 4th of August, 1827, and in consideration of 500*l.* paid by Catherine Phillips to Thomas Gutteridge, the receipt whereof and the payment of the 300*l.* and 400*l.*, making together 1200*l.*, Thomas Gutteridge thereby acknowledged, they the executors of Mrs. Mason and Henry Thomas Parkes, at the request and by the direction and appointment of Thomas Gutteridge, assigned and Thomas Gutteridge granted, assigned and confirmed unto Catherine Phillips, her executors, administrators, and assigns, the premises comprised in both the mortgages, and all the estate, right, title, interest, use, trust, possession, benefit, claim, and demand whatsoever, both at law and in equity, of them the executors of Mrs. Mason, Henry Thomas Parkes and Thomas Gutteridge, or any or either of them respectively, of, in, to or out of the premises or any part thereof, together with all deeds, evidences and writings relating to the title of the premises, to hold the premises unto Catherine Phillips, her executors, administrators, and assigns, for the residues of the terms granted by the leases and during all other the term or terms which James Gutteridge had in the premises, in as full, large, ample and beneficial a manner to all intents and purposes as they, Thomas Welch and John Arnold, Henry Thomas Parkes and Thomas Gutteridge, could or might assign or transfer the same, or as they or any or either of them, their or any or either of their executors, administrators, or assigns, could or might have held or * enjoyed the same if the deed had not * 534 been made, freed and discharged from the respective provisos for redemption contained in the mortgages of the 16th of August, 1820, and the 4th of August, 1827, and all equity thereupon, but subject to the proviso therein contained: provided always, that if Thomas Gutteridge, his executors or administrators, should pay unto Catherine Phillips, her executors, adminis-

trators, or assigns, 1200*l.* and interest on the 30th of July then next, Catherine Phillips, her executors, administrators, or assigns, would reassign the premises to Thomas Gutteridge, his executors, administrators, or assigns.

The deed contained covenants by Thomas Gutteridge with Catherine Phillips for payment to her, her executors, administrators, or assigns, of the 1200*l.* and interest at the above-mentioned day, and the usual covenants for title, but no assignment of the mortgage debt.

Mrs. Phillips had died, and the plaintiffs were her executors.

The bill, which was filed on behalf of the plaintiffs, and all other the creditors of the late James Gutteridge, stated that the defendant Harriett Gutteridge alleged that she was entitled to be paid her annuity of 60*l.* per annum out of the rents and profits of the leasehold premises, in priority to the 500*l.* advanced by Catherine Phillips to Thomas Gutteridge, whereas the plaintiffs charged the contrary, and that the 500*l.* was advanced and lent by Catherine Phillips to Thomas Gutteridge as executor of James Gutteridge, and to enable him to pay and discharge the debts of the testator, and that he so applied the same.

* 535 * The prayer was, that an account might be taken of what was due for principal, interest, and costs on the mortgage of the 30th of January, 1840; that the defendants might be decreed to pay to the plaintiffs, as such executors as aforesaid, the amount which should be so found due, together with their costs of the suit, by a short day to be appointed for that purpose, or, in default thereof, that the leasehold premises might be sold, and that the proceeds of such sale, or a sufficient part thereof, might be applied in payment of what should be so found due to the plaintiffs, and their costs of the suit as aforesaid, and for further relief.

The Vice-Chancellor held, that the 60*l.* annuity had priority over the 500*l.*, but that the first two mortgages made by the testator in his lifetime (the equity of redemption subject to which he charged with the annuity) stood as first incumbrances. Upon the question whether the Court ought at once to decree the sale of this mortgaged property, his Honor was of opinion that the legislative power of ordering a sale of a mortgaged estate at the instance of the first mortgagee, was to a certain extent a discretionary power, but was only to a certain extent discretionary,

and that when a sale was asked by a first mortgagee, all the circumstances of the case should be regarded. That in this case the nature of the property itself and its present situation seemed to show, that the wisest course for Miss Gutteridge herself, who stood third as incumbrancer, and the wisest course for everybody interested in the estate was, that there should be an immediate sale. The property was leasehold, of which there were only about thirty years to run, a circumstance which his Honor considered material, when the first mortgagee asked to be no longer delayed in having the property realized, and the rents were insufficient to keep down the interest on the first mortgage.

* By the decree under appeal it was declared that the * 586 plaintiffs were entitled to the first charge on the mortgaged premises in respect of the two mortgages for 400*l.* and 300*l.*, that the annuity of 60*l.* per annum bequeathed by the will of James Gutteridge to Harriett Gutteridge and her children was the second charge upon the mortgaged premises, that a contingent charge of 400*l.* created by the will of James Gutteridge in favour of the children of Harriett Gutteridge was the third charge on the mortgaged premises, and that the plaintiffs' mortgage of 300*l.* under the indenture of the 30th of January, 1840, was the fourth charge, and after directing accounts of the sums due on these incumbrances, the decree ordered that the mortgaged premises should be sold, and that the money to arise from such sale should be paid into the bank to the credit of the cause, subject to further order.

From so much of the decree as declared the plaintiffs entitled to the first charge on the mortgaged premises and directed the accounts of what was due thereon, and of so much of the decree as ordered a sale of the mortgaged premises, the defendant Harriett Gutteridge appealed.

Mr. Beavan, in support of the appeal. — The original mortgage debts of 400*l.* and 300*l.* were not kept alive by the mortgage of January 30th, 1840, which was altogether a new mortgage, and took effect entirely out of the equity of redemption of Thomas Gutteridge, which was subject to Miss Gutteridge's annuity. There was no assignment of the old mortgage debts, or any transfer of those mortgages. The debts were discharged, and if an action were brought on either of them payment might be pleaded.

So the case stood at law. In equity the ordinary form of decree would direct an inquiry as to what was due upon the * 537 original mortgage * debts, and the certificate would find that they had been paid, and that there was nothing due. The deed of 1840 was in every respect a new transaction; not only were there new covenants, but the debtor was changed, there being a new covenantor. The new mortgagee released the testator's estate and took the personal security of the executor. How could the original mortgages in such circumstances be held to have been kept alive? But the point is settled by the authority of *Toulmin v. Steere* (a) and *Parry v. Wright*; (b) the latter of which cases was twice (c) argued before Sir J. LEACH and once before Lord LYNDBURST, with the same results in each case. These cases have never been overruled, and are cited in text-books and books of practical conveyancing as authorities: Sugden on Vendors and Purchasers, (d) Jarman's Bythewood, (e) Coote on Mortgages; (g) and have been followed in other cases: *Medley v. Horton*, (h) *Smith v. Phillips*, (i) *Farrow v. Rees*, (k) *Otter v. Vaux*. (l) In *Copis v. Middleton*, (m) *Jones v. Davids*, (n) a debt when paid off, even by a surety, was held not to be kept alive for his benefit; so that in order to give this benefit legislative enactment was required, and was applied to that case, but not to such a one as the present, by the Mercantile Law Amendment Act.

At all events a sale ought not to have been directed when the annuitant was willing to redeem the two old mortgages for 300*l.* and 400*l.* Such a decree can only be made under the 15 * 538 & 16 Vict. c. 80, § 48, the application * of which is not obligatory but discretionary, and is not to be made oppressively, and certainly ought not to be made to operate retrospectively. Before that Act passed, this annuitant had a right to redeem the old mortgages, and the Act could not have been intended to take away existing rights. Even in Ireland, where

(a) 3 Meriv. 210.

(b) 1 Sim. & Stu. 368; 5 Russ. 142.

(c) See 1 Law J., O. S. 163.

(d) Page 615 (13th ed.).

(e) Vol. 5, p. 455 (3d ed.).

(l) 2 K. & J. 650; 6 De G., M. & G. 638.

(m) T. & R. 224.

(g) Page 394 (3d ed.).

(h) 14 Sim. 226.

(i) 1 Keen, 699.

(k) 4 Beav. 18.

(n) 4 Russ. 277.

the practice always was to sell and not foreclose, sales were always made subject to annuities, if the annuitant was willing to redeem prior mortgages. There is no authority to convert the defendant's security from one on real estate to a mere charge on personalty. The leaseholds now produce a very large income, which by a sale will be reduced to three per cent.

He referred to and commented upon *Hurst v. Hurst*, (a) *Roberts v. Price*, (b) *Smith v. Robinson*. (c)

Mr. Malins and *Mr. W. Rudall*, for the respondents, were not called upon.

THE LORD JUSTICE KNIGHT BRUCE.— The recitals in the deed of the 30th of January, 1840, disclose all the facts. [His Lordship read them.] This deed is so constructed as to render it possible that the payment to the original mortgagees operated as an extinguishment of the original mortgage debts as debts. But the existence of them independently as debts was not essential to the continuance of the security. The mortgagees had a right to hold the property till the debts were paid,¹ and the debts were secured by a legal estate which could not be recovered by the mortgagor or his representative without payment of the debts. This right was * transferred to the plaintiff's testa- * 539
trix. The conveyancing may not have been perfect, but there can be no doubt as to the intention of all parties to preserve the priority of the charges of 300*l.* and 400*l.*

The decree appears to be right.

The Lord Justice TURNER concurred.

Appeal dismissed with costs.

(a) 16 Beav. 375. (b) 1 W. R. 303. (c) 1 Sm. & Giff. 140.

¹ *Davis v. Maynard*, 9 Mass. 242.

MUTLOW v. MUTLOW.

1859. July 13, 14. Before the LORDS JUSTICES.

A testator died in 1842 entitled in reversion to a moiety of a settled fund of personalty. His other property, consisting of real estate charged by his will with debts, was administered by the Court. In 1858, the reversion fell into possession, the trustees of the settlement paid the money into Court under the Trustee Relief Act, and the testator's moiety was paid out to his executors.

Held, reversing the decision of the Court below, that this fund was distributable as legal assets.¹

Held, further, that this fund must bear a share of the costs of suit, which had been paid out of the equitable assets.

THIS was an appeal by specialty creditors of Thomas Wilson from an order of Vice-Chancellor STUART, treating as equitable assets the testator's share in a fund of personalty, comprised in a settlement made by his parents.

By the settlement in question, dated the 17th of June, 1811, a sum of 1550*l.* was settled upon trust, that the trustees should invest it in government or real securities, with power to vary the investment, and should pay the income to the testator's mother for life, then to his father for life, and after the death of both should hold the capital in trust for their children as therein mentioned.

* 540 * The testator's father died in 1821. The testator died in 1842, having acquired a vested interest in one moiety of the settled fund, and the testator's mother died on the 10th of August, 1858. Upon the execution of the settlement, the trust funds were invested on two mortgages for 1000*l.* and 550*l.*, the 1000*l.* was paid off in 1852, and the 550*l.* in 1856. The acting trustee, as stated by himself, did not reinvest either of them, but continued to pay interest to the testator's mother till her death, shortly after which, owing to a doubt which had been suggested as to the construction of the settlement, he paid the money into Court, under the Act for the Relief of Trustees. On the 14th of January, 1859, an order was made under the Act

¹ See Lewin Trusts (5th Eng. ed.), 589; *Christy v. Courtenay*, 26 Beav. 140; *Lovegrove v. Cooper*, 2 Sm. & Gif. 271.

for payment of one moiety of the fund to Benjamin Mutlow, and for payment of the other moiety to the testator's executors. The share thus received by them amounted, after deducting costs, to 701*l.* 14*s.* 5*d.*, which was the sum now in dispute.

Not long after the testator's death, a creditors' suit had been instituted for the administration of his estate by a simple contract creditor, and the usual decree was made on the 26th of April, 1843. On the 4th of June, 1845, an order on further directions was made, directing the accounts to be continued and ordering a sale of the testator's real estates, which by his will were subjected to his debts, so as to be equitable assets. By an order made on subsequent further directions on the 16th of July, 1851, the proceeds of the sales were ordered to be applied in payment of the incumbrances affecting the estates, and then in payment of the costs of the suit, and the order then proceeded to direct the Master to calculate subsequent interest on the debts, and to apportion such sum of cash as, after payment of the costs, might remain to the credit of the cause, among the creditors, * both simple contract and specialty, in pro- * 541 portion to their respective debts.

After payment of the costs of suit, which amounted to 670*l.*, and the incumbrances, there remained in Court only the sum of 14*l.* 7*s.* 9*d.*, arising from the sale of the testator's real estate. With the exception of the above-mentioned reversionary interest, which was found in the Master's report as outstanding personalty, the 14*l.* 7*s.* 9*d.* was the only sum applicable to payment of the testator's debts, which amounted to 1982*l.* by specialty, and 1609*l.* on simple contract.

In 1859, the testator's executors having received the sum of 701*l.* 14*s.* 5*d.*, as mentioned above, applied by summons for leave to pay it into Court, and for directions as to its application, and on the 27th of May, 1859, Vice-Chancellor STUART made an order, declaring the 701*l.* 14*s.* 5*d.* to be equitable assets of the testator, and divisible as such among all the creditors, directing that, notwithstanding the order of the 16th of July, 1851, the 14*l.* 7*s.* 9*d.* should be paid to the solicitor of the executors in part discharge of their costs of the application, that certain costs of specified amount should be paid out of the 701*l.* 14*s.* 5*d.*, and that the residue, amounting to 683*l.* 16*s.* 11*d.* should be apportioned among the creditors, both simple contract and specialty,

in proportion to the amounts of their respective debts, and that the executors should pay the amounts so apportioned to the creditors or their respective representatives.

One of the specialty creditors moved before the Vice-Chancellor for the discharge of so much of this order as directed the distribution of the 683*l.* 16*s.* 11*d.* among all the creditors, and for the substitution of directions for distributing it ratably * 542 among the specialty * creditors only. The Vice-Chancellor refused the motion with costs, and the specialty creditor now moved, by way of appeal, from that order.

Mr. Craig and *Mr. Springall Thompson*, for the appeal motion. — The fund was recoverable by the executor *virtute officii*, and therefore is legal assets. That is the principle laid down in *Cook v. Gregson* (a) and *Shee v. French*. (b) Personal property, in which the testator has a beneficial interest, recoverable by the executor by the mere force of his appointment to be executor, is not made equitable assets by the fact that it can only be got at by coming to a Court of Equity. *Wilson v. Fielding*. (c) The case of *Sir Charles Cox's Creditors* (d) and *Hartwell v. Chitters* (e) cannot be treated as of any authority. *Plunket v. Penson* (g) does not touch the case of personalty. The Vice-Chancellor seems to have thought that the fact of the fund having been paid into Court under the Trustee Relief Act might make a difference, but payment into Court under that Act does not alter the rights to the fund.

Mr. Elmsley and *Mr. Piggott*, for the simple contract creditors. — The whole costs of this suit have been borne by the equitable assets, and if the Court decides this fund to be legal assets, it ought to bear them as being the primary fund for payment of debts and costs of administration ; or, at all events, there ought to be an apportionment of the costs between the legal and equitable assets.

The Lord Justice TURNER referred to *Lowthian v. Hasell*. (h)

(a) 3 Drew. 547.

(b) 3 Drew. 716.

(c) 2 Vern. 763.

(d) 3 P. Wms. 341.

(e) Amb. 308.

(g) 2 Atk. 290.

(h) Seton on Decrees, 125 (2d ed.).

* *Mr. Chapman Barber*, for the executors.

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Mr. Craig, in reply. — There is no precedent for a retrospective apportionment of costs such as is now asked for. Nor is an apportionment reasonable, for there never was any personalty to pay specialty debts, so the suit must be considered as one for the benefit of simple contract creditors.

THE LORD JUSTICE TURNER. — I am clearly of opinion that the 70*l.* 14*s.* 5*d.* is legal assets, and as such belongs to the specialty creditors; but as they have taken the benefit of the suit they ought to bear part of the costs, and not let them fall wholly on the equitable assets, so as to leave nothing for the simple contract creditors. To make an accurate apportionment would only do injury to all parties by increasing the costs, and we therefore propose to make an order which will effect a tolerably correct apportionment without occasioning any further expense. So much of the costs of the suit as related to the sale of the real estate and the ascertaining and paying off the incumbrances ought to be borne by the proceeds of sale, which form the equitable assets; and then, as the legal and equitable assets are of nearly equal amounts, the remaining costs may be treated as payable out of the two funds equally. Let a sum equal to one moiety of these remaining costs be deducted from the 70*l.* 14*s.* 5*d.* and be distributed by the executors, together with the 14*l.* 7*s.* 9*d.*, among the simple contract creditors; and let the executors divide the residue of the 70*l.* 14*s.* 5*d.*, after payment of the costs of all parties before the Vice-Chancellor and here, among the specialty creditors.

The Lord Justice KNIGHT BRUCE concurred.

* 544 * In the Matter of THE MEXICAN AND SOUTH AMERICAN COMPANY.

GRISEWOOD AND SMITH'S CASE.

DE PASS'S CASE.

1859. June 1, 2, 8. July 15. Before the LORDS JUSTICES.

A trading company was established in 1835, upon the terms contained in the prospectus, which placed its affairs under the management of individual directors, but contained no provision as to the transfers of shares. The certificates of shares purported to give the holder a title to the shares, which accordingly were treated as transferable by delivery of the certificates. *Held*, that the having shares transferable by delivery, was not such an assumption of a corporate character as to make the company illegal.¹

A person who buys shares in a trading company is to be taken to have bought them subject to their existing liabilities, and, on the winding-up of the company, is liable to contribute, as well towards debts incurred before as those incurred after the purchase.²

G. & S. bought shares in a company, whose shares passed by delivery of the certificates. Some of the certificates were not delivered until after an order for winding up the company had been made. *Held*, that G. and S. were contributories in respect of these shares, as well as in respect of those the certificates of which had been delivered before the winding-up order.

P. held 250 shares in the same company, for which he had paid 1750*l*. A few days before the winding-up order, he, being aware that the company was in difficulties, handed over the certificates to a clerk of his, there not having been any previous negotiation for the sale of them, and the clerk gave him 1*l*. for them. It was not disputed that P. made this transfer in order to escape liability, but the Court was satisfied, on the evidence, that it was an absolute and *bond fide* transfer out and out, without any trust or reservation. *Held*, that P. was not a contributory.³

THE first of these cases, that of Messrs. Grisewood and Smith, was an appeal from an order of the Master of the Rolls, dated the 7th of May, 1859, by which the appellants were placed or

¹ See 1 Lindley Partn. (Eng. ed. 1860) 152, 596, 599; 2 *ib.* 1090, 1113.

² See Holme's Case, 2 De G., M. & G. 113; Cape's Executor's Case, 2 De G., M. & G. 562; Mayhew's Case, 5 De G., M. & G. 836; 1 Lindley Partn. (Eng. ed. 1860) 318.

³ See *Ex parte* Parker, L. R. 2 Ch. Ap. 685; Weston's Case, L. R. 6 Eq. 288; s. c. 4 Ch. Ap. 20; Glanville's Case, L. R. 10 Eq. 479, 481.

retained on the list of contributories of the company as the holders of 405 shares, and it was asked by the notice of appeal motion, not only that the order of the 7th of May, 1859, might be discharged, and the names of the appellants removed from the list of contributories, but also that, if necessary, the order for winding up the company, dated the 24th of November, 1857, and an order for a call of 9*l.* per share, dated the 27th of April, 1859, might likewise be discharged. The other case, that of the Messrs. De Pass, * was an appeal from orders of the * 545 Master of the Rolls, dated the 18th of April and the 4th of May, 1859, by which those appellants were placed or retained on the list of contributories as the holders of 250 shares in the company. These appeals were heard separately, but judgment was delivered in both cases at the same time.

The company was formed in the month of April, 1835. It was formed in the first instance with the view of making advances of money to the owners of mines in Mexico, and receiving the produce of the mines at fixed rates yielding a good return for the advances, but it was afterwards extended to mining operations. Upon the formation of the company certificates were issued to the subscribers, which were in the following form: "The holder of this certificate having paid £ [1*l.* per share] to the directors of the Mexican and South American Company, will be entitled to shares on his making the following payments, &c.," such further payments being those mentioned in the prospectus, a copy of which was printed upon the certificates. This prospectus was the only instrument defining the constitution of the company, no deed of settlement ever having been executed.

The prospectus, after stating the objects of the company, proceeded as follows:—

"For the foregoing purposes it is proposed to raise a capital of 100,000*l.*, in 10,000 shares of 10*l.* each; of this sum 5*l.* per share is to be paid at the following periods, namely, 1*l.* per share on subscribing; 1*l.* ditto on the 1st of September, 1835; 1*l.* ditto on the 1st of December, 1835; 1*l.* ditto on the 1st of February, 1836, and 1*l.* ditto on the 1st of April, 1836. The remainder of the capital to be called for when required by the directors, in sums not exceeding 1*l.* per share at each call, * and at * 546

an interval of not less than two months between each call; thirty days' notice of each call to be given in the London Gazette and three daily morning and evening papers. If any call be not paid within thirteen days of the same becoming due, the directors shall, at the first convenient opportunity, sell the shares so in default, and hold the proceeds thereof, after deducting the amount of the call and interest thereon at 5l. per cent per annum, at the disposal of the proprietors thereof. As the principle on which the company is formed is that of putting its capital speedily into active operation, and as one engagement has already been made for this purpose, it is proposed that the dividend at the rate of 6l. per cent per annum on the subscribed capital shall be at once fixed, and that the directors shall make such additions from time to time thereto in the shape of bonus as the state of the company may authorize, the first dividend to be paid on the 1st of January, 1837. In the event of the operations of the company admitting of the advantageous employment of a larger amount of capital, the directors shall have the power to create 10,000 additional shares of 10l. each, the same to be issued preferably to the holders of the existing shares; and in the event of its appearing expedient still further to increase the capital, a further creation of shares may take place with the consent of the majority of the shareholders at a general meeting to be called for that purpose, the same being in all cases to be issued preferably to the holders of existing shares. The affairs of the company to be managed by the board of directors; the directors remain in office until the second Wednesday in May, 1840, when, and at the same period annually, one director shall go out of office. Vacancies in the direction previously to the second Wednesday in May, 1840, shall be filled up by the directors; after that period they shall be filled up by the proprietors at the general annual * 547 meeting, or at a general meeting to be * called specially for that purpose. A director retiring to be immediately re-eligible. The auditors shall be elected annually at the general meeting of the proprietors. Fifty shares shall be the qualification of a director, and forty shares the qualification of an auditor. A general meeting of the proprietors shall be held on the second Wednesday in May in each year, when the state of the company's affairs will be laid before them. Certificates will be issued for the shares; a proprietor of twenty-five shares to have one vote,

&c. It is proposed that on the payment of each dividend a sum equal to 10% per cent of the amount thereof shall be appropriated to form a reserve fund, and that if at any time the shares of the company should be below par, the directors shall have authority, if they shall see fit, to apply the amount of the reserve fund to the purchase of such shares for the account of the company, such shares, if afterwards disposed of, to be sold by public tender for the account of the company."

The prospectus, it will be observed, stated nothing as to the mode of transferring shares. In 1852 the directors issued other certificates in the following form: "The holder of this certificate is entitled to — shares of 10% each in the Mexican and South American Company, on which 9% per share has been paid." The shares were throughout treated as being, as they appeared by the certificates to be, transferable by delivery. At different times after the formation of the company further shares were issued under the powers given by the prospectus, and certificates were issued for these shares varying somewhat in form from the first certificates, but still purporting that the holders were entitled to the shares.

On the 24th of November, 1857, an order was made for the winding up the company.

* Messrs. Grisewood and Smith, the appellants in the * 548 first case, were share-dealers, and the course of their business was to buy and sell shares on their own account and for their own profit. On the 18th of November, 1857, they bought 80 shares, and on the 23d of November, 1857, they bought 325 more shares in this company, making together the 405 shares, to which this appeal motion applied. The certificates for 300 of these shares were handed over to them before the 24th of November, 1857, and were in their hands on that day. Some time after that day they received the certificates of the remaining 105 shares.

Messrs. De Pass had been, for about eighteen months before November, 1857, the holders of 250 shares, for which they had paid 1750%. They had paid calls on these shares, and one of the members of the firm had been an auditor of the company. On the 8th of November, 1857, Mr. Benjamin de Pass handed over these certificates to Mr. Spencer, a clerk in the employment of

the firm, who gave him 1*l.* for them. The evidence both of Mr. Benjamin de Pass and of Mr. Spencer was to the following effect: That Mr. De Pass, without any previous communication with Mr. Spencer, handed the certificates over to him, saying that he should have them for a sovereign, and that Mr. Spencer at once accepted them and paid that sum. Nothing further passed between them on the subject, and it was positively deposed to by Mr. De Pass that there was no understanding between him and Spencer that the firm should retain any interest in the shares, nor any understanding that Spencer should be indemnified against his liabilities in respect of them. It appeared plainly that the Messrs. De Pass had at the time good reason to believe that the company was in difficulties. Spencer retained

the shares about three weeks, and then sold them to a
 * 549 Mr. Joseph, a traveller of the * Messrs. De Pass; 1*l.* was considerably below the market value of the shares at the time of this transaction, and the shares above mentioned to have been bought by Messrs. Grisewood and Smith on the 18th and 23d of the same month were bought by them at the average price of about 7½*d.* per share. After the transfer to Spencer, notices and circulars continued to be sent by the secretary to the Messrs. De Pass, who neither replied to them nor forwarded them to Spencer, but destroyed them. The Master of the Rolls under these circumstances held that the transfer to Spencer was not *bonâ fide*, and that Messrs. De Pass must be on the list of contributories.

June 1, 2.

Mr. Selwyn, Mr. Waley, and Mr. Horace Lloyd, for Messrs. Grisewood and Smith. — This was a bubble company, illegal at common law, and there cannot be any right to call on us for contribution. We may raise this contention without challenging the order for winding up; it may be good as to the original shareholders and yet not good as to us. *Barclay's Case*. (a) The company assumed to act as a corporation by making its shares transferable at the will of the holder, and thus was illegal. *Vice v. Lady Anson*, (b) *Ex parte Finlay*, (c) and the cases cited in *Aston's Case*. (d) The issue of the new shares, moreover, was a fraud for the benefit of the old shareholders, the company

(a) 26 Beav. 177.

(c) 26 Beav. 182.

(b) 7 B. & C. 409.

(d) *Supra*, 320.

being at that time known to the directors to be insolvent. Also we never became shareholders. There is no case in which a person has been held liable where he has signed no document. It is the general understanding of the commercial world that a person who merely takes * scrip incurs no liability * 550 until he does some act to make himself a shareholder. That understanding is not of itself decisive, but the cases tend to show its correctness. By the terms of the scrip certificates the bearer is to become a shareholder on doing certain things, none of which have been done; nor have we ever received a dividend; the persons who last received dividends on these shares ought to be contributories in respect of them, not we. From the observations of Lord CRANWORTH in *Mayhew's Case*, (a) it appears that merely taking scrip will not make a person a shareholder. If we are contributories at all it ought to be with a qualification such as in *Sanderson's Case*, (b) that we are only liable to debts contracted after we took our shares. This is the general rule as to partners, and there was no power here to create shares having incidents differing from those of shares in an ordinary partnership; we are therefore not liable to the old debts, for there is nothing from which a contract can be inferred to become liable to antecedent debts. It will be urged that this is inconvenient, but that argument has not much weight; the persons who contracted are liable to the creditors, and if this Court finds insuperable difficulty in working out the rights of the parties they must be left as they are. *Clough v. Ratcliffe*. (c) Even if the company was not illegal at common law, it was so under 19 & 20 Vict. c. 47, § 4, until that section was repealed by 20 & 21 Vict. c. 14, § 3, and the debts contracted during that period being illegal, there cannot be any right of contribution in respect of them. The order for the call is therefore invalid. We were induced to take shares by false representations, especially by the payment of large dividends when there were not any profits out of which they could * be paid, * 551 and we come within *Brockwell's Case*, (d) and the observations of Lord Justice TURNER in *Nicoll's Case*. (e) As to the 105 shares which were not delivered till after the winding-up

(a) 5 De G., M. & G. 837.

(d) 4 Drew. 205.

(b) 3 De G. & Sm. 66.

(e) 3 De G. & J. 387.

(c) 1 De G. & Sm. 164, 176.

order, we at all events ought not to be contributories, for the equities should be treated as fixed at that date.

Mr. Roundell Palmer and *Mr. Roxburgh*, for the official manager.—No reason has been shown for disturbing the call beyond the argument, that the debts incurred during the year which followed the passing of 19 & 20 Vict. c. 47, ought to be disallowed. But the debts stand allowed, having been ascertained in Chambers, and this is not the way of reviewing their allowance. Moreover the 19 & 20 Vict. c. 47, never had such an effect as that contended for, it merely imposed certain liabilities on companies which did not register under that Act, and did not make their trading illegal. Even if this be not so, the 4th clause was repealed in the following session, and so, as to incomplete transactions, became as if it had never existed. As to the winding-up order the time for appeal is passed: *Re Chepstow, Gloucester, and Forest of Dean Railway Company*; (a) and moreover, the order has been enrolled. Then, as to the liability of these appellants to be on the list. It is said that this was a bubble company, but there is no pretence for that; it was a *bond fide* company with large assets. There is no authority for the proposition, that creating transferable stock is illegal at common law, or even under the statute 6 Geo. 4, c. 91 (the Bubble Act): *Rex v. Webb*; (b)

and in *Duvergier v. Fellowes*, (c) it was held that the repeal of * the Bubble Act left bubble companies to common law, and that under it a company, which was really a bubble company, as the one in that case was, was illegal. Lord LANGDALE appears to have thought, in *Jackson v. Cocker*, (d) that dealings in scrip were illegal; but that is shown to be groundless by *Young v. Smith*. (e) In *Blundell v. Windsor*, (g) the plaintiff introduced allegations into his bill, which showed the company to be illegal; but in *Harrison v. Heathorn*, (h) the same company was held legal. The certificates in this case do not contain any representations bringing the company within the Bubble Act. *Sheppard v. Oxenford*. (i) The only representation as to transfer which makes a company guilty of assuming to act as a cor-

(a) 2 Sim. N. S. 11.

(b) 14 East, 406.

(c) 5 Bing. 248.

(d) 4 Beav. 59.

(e) 15 M. & W. 121.

(g) 8 Sim. 601.

(h) 6 M. & G. 81.

(i) 1 K. & J. 491.

poration, is a representation that shares can be transferred so as to exempt the transferor from all liability to creditors for debts incurred before the transfer. There was no fraud in the issue of the new shares, the directors were misled by the reports of their agents in America. As to the transferees having done no acts to make themselves shareholders, that is disposed of by *Yelland's Case*, (a) and *Cookney's Case*. (b) The appellants came into the concern as a going concern, and took the shares subject to existing debts. *Cape's Executor's Case*. (c)

Mr. Southgate, for the creditors' representative. — In *Sanderson's Case* (d) the decision was put on the ground that the Court had nothing to do with liability to creditors, but only with liability of the shareholders *inter se*; but now the creditors are parties to the proceeding, and are before the Court. That case is in our * favour as to the effect of an agreement to take shares * 553 which has not been completed, and so disposes of the point as to the 105 shares.

Mr. Waley, in reply.

Judgment reserved.

June 8.

Mr. Selwyn and *Mr. Hobhouse*, in support of the appeal of Messrs. De Pass. — The Messrs. De Pass parted with their shares *bonâ fide* before the winding-up order. It was a complete legal transfer, there was no reservation for the benefit of the transferor, and no agreement to indemnify the transferee. The case is analogous to that of leaseholds; an assignee of which may assign to a pauper in order to avoid his liability for the rent and covenants, and there is no equity to restrain him from doing so. *Onslow v. Corrie*, (e) *Rowley v. Adams*, (g) *Valliant v. Dodemede*. (h) *Jessop's Case*, (i) substantially governs the present.

Mr. Roundell Palmer and *Mr. Roxburgh*, for the official mana-

(a) 5 De G. & Sm. 395.

(b) 3 De G. & J. 170.

(c) 2 De G., M. & G. 562.

(d) 3 De G. & Sm. 66.

(e) 2 Madd. 330.

(g) 4 My. & Cr. 534.

(h) 2 Atk. 546.

(i) 2 De G. & J. 638.

ger. — This was not a *bonâ fide* transfer, such as to release Messrs. De Pass from their liability. There is no analogy between this case and that of a transfer by an assignee of leaseholds; there is no privity between the landlord and the assignee; but this is a case of partnership, and the partnership contract which creates a privity between the partners makes *bona fides* necessary in all dealings by which they affect each other. *Blissett*

* 554 v. * *Daniel*. (a) The question is, whether there was a real and *bonâ fide* transfer with intent to substitute a person who meant to go on with the company. It is plain that there was not; there was no negotiation, the clerk was merely passive, it was a mere device by Mr. De Pass to get rid of his liability.

[*Mr. Selwyn*. — An assignee of a share in a partnership may assign to an insolvent. *Jefferys v. Smith*. (b)]

Lund's Case (c) is precisely in point.

Mr. Southgate, for the creditors' representative.

Mr. Selwyn, in reply. — I admit that this transfer was made in order to escape from liability, and I contend that Mr. De Pass was entitled to make it for that purpose. His liability arose by a delivery of shares to him, he never received a dividend, never was in communication with the company, there was nothing to create an equity restraining him from parting with his shares. There is no suggestion in evidence that Spencer is insolvent. The time of transfer and the situation of the company are not material. In *Lund's Case* the transferor had acted as a shareholder and admitted himself liable, which distinguishes that case, if such a distinction be needed, for I submit that all that is required is, that there should be an out-and-out parting with the shares to a person not filling any fiduciary position with regard to the company. Mr. De Pass is merely a former shareholder, and ought not to be on the list. *Sutton's Case*. (d)

Judgment reserved.

(a) 10 Hare, 493, 522.

(b) 3 Russ. 158.

(c) 27 Beav. 465.

(d) 3 De G. & Sm. 262.

July 15.

* The Lord Justice TURNER, after stating the history * 555 of the company to the same effect as above, and the facts relating to the acquisition of shares by Messrs. Grisewood and Smith, proceeded as follows: —

The question is, whether Messrs. Grisewood and Smith ought to have been put upon the list of contributories as to all or any of these 405 shares. Now, at the date of the winding-up order, Messrs. Grisewood and Smith were both the legal and equitable owners of 300, and were the equitable owners of the remaining 105 of the shares, and *prima facie* therefore there can be no doubt that it was proper to put them upon the list. Apart from the special ground to which I shall presently advert, nothing was said in the course of the argument, and nothing has on further consideration occurred to my mind, which can in any way exempt them from being liable as contributories. It was said, indeed, on their behalf, that there could be no debts of the company contracted after the 18th of September, 1857, and none therefore to which they could be liable to contribute, and that no express contract was shown, and no contract on their part could be implied to indemnify the parties from whom they had purchased these shares; but it seems to me to follow, from the very nature of the shares, that these parties must be held to have purchased them subject to the existing debts. The shares were purchased by them as shares in a continuing concern, and, in the absence of an express contract to that effect, it cannot, I think, be supposed that either the vendors of the shares or these parties as the purchasers of them could have intended that the accounts of the concern were to be taken down to the time of the purchase, and the proportion of the then existing debts attributable to the shares be paid by the vendors. It was also said, on the part of these appellants, that as to the 105 shares the contract * had not * 556 been completed at the date of the winding-up order; but it was not attempted to be denied that there was at that time a valid and binding contract for the purchase of these shares, — that contract was indeed afterwards completed; and it is settled by the authorities that in such cases the purchasers of the shares are to be put upon the list. Apart, therefore, from any special

grounds, I think that these appellants were properly put upon the list as to the whole of the 405 shares.

It was said, however, on the part of these appellants, that this company was illegal, and the argument on that point was urged both with reference to the liability of the appellants and to the validity of the winding-up order; and it was also said on their behalf that the shares of which they are the holders were fraudulently issued by the directors. These shares, however, appear to have been bought by the appellants in open market; and whatever their rights and remedies may be as against the directors in respect of the alleged fraud, it does not seem to me that they have made out any case which can entitle them to relief upon this ground as against the other shareholders. *Nicoll's Case* is not without its bearing upon this point.

Then, as to the alleged illegality of the company. This is, in truth, no more than an association of a large number of persons for the carrying on mining operations, or operations connected with mining, in foreign countries, and no public mischief is shown to have been contemplated in the formation of the company or to have resulted from it. It was said that the persons associated assumed to act as a corporation, that they traded as a company, and that the shares were transferable; but the mere trading as a

company is not assuming to act as a corporation, or, as I
 * 557 apprehend, is the circumstance of * shares being transferable any thing more than evidence leading to the presumption of the corporate character having been assumed, and here any presumption which might have been drawn from the shares being transferable seems to me to be completely negatived by the facts of the case, for by the prospectus defining the constitution of the company every thing is left to the management of individual directors, and all the proceedings of the company appear to have been carried on by the directors in their individual character. I think, therefore, that neither the case of illegality nor the case of fraud can be maintained. What fell from the Court of Common Pleas in the case of *Harrison v. Heathorn*, (a) seems to me to have an important bearing on this question of illegality, although the case itself may well be distinguished from the present.

Another point was raised on the part of these appellants with

(a) 6 M. & G. 81.

reference to the order for the call. It was said that by the 4th section of 19 & 20 Vict. c. 47, the trading company was illegal from the 3d of November, 1856, to the 14th of July, 1857, when the section referred to was repealed by the 20 & 21 Vict. c. 14, § 3, and that the debts contracted during this period were not the debts of the company, but debts of the individuals who were at the time the shareholders in the company. I think, however, that this point is also untenable, for I apprehend that where an Act of Parliament, or part of an Act of Parliament, is repealed, it must, as was laid down by Lord TENDERDEN, in *Surtees v. Ellison*, (a) be considered as if it never had existed except as to transactions which are past and closed, and it cannot be said that the transactions in this case were passed and closed whilst the debts remained unpaid. I am of opinion, * therefore, * 558 that the appeal of Messrs. Grisewood and Smith wholly fails, and that their motion must be refused, and with costs.

Then, as to the case of the Messrs. De Pass. They are put upon the list for 250 shares which were formerly held by them, and for which they had paid 1750*l.* Their case is, that on the 8th of November, 1857, sixteen days before the date of the winding-up order, they delivered over these shares to Mr. Spencer, one of their clerks, in consideration of the sum of 1*l.* paid by him to them. It sufficiently appears, I think, from the evidence, that at this time they were aware, or at all events had good reason to suspect, that the company was in difficulties. It was, indeed, admitted in the reply that their object was to get rid of their liability, and it was insisted that they were entitled to do so. I agree that they were, for I cannot see what equity there could be on the part of the other shareholders to insist upon their retaining the shares. The question, therefore, as to these appellants seems to be, whether they did or did not on the 8th of November, 1857, *bonâ fide* part with these shares out and out. I had much doubt upon this point when the case was argued, more especially from the fact that even at a later date the shares appear to have been sold in the market at a price which would have yielded more than was paid for them to the appellants by their clerk, but I have since read and considered the evidence more carefully, and I am satisfied that we can come to no other conclusion upon it than that these shares were on the 8th of

(a) 9 B. & C. 750.

November, 1857, absolutely and *bond fide* parted with by the appellants out and out, without any trust for their benefit, or any reservation whatever; and I am of opinion, therefore, that this order must be discharged, and the names of these gentlemen removed from the list. I think, however, that the trans-
 * 559 action was one requiring * the most searching investigation, and that there should be no costs to the appellants of any part of the proceedings.

THE LORD JUSTICE KNIGHT BRUCE. — I am also of opinion that the appeal of Messrs. Grisewood and Smith fails, and that the appeal of Messrs De Pass does not. I agree also as to costs.

TAYLER v. THE GREAT INDIAN PENINSULA RAILWAY COMPANY.

1859. May 30, 31. July 15. Before the LORDS JUSTICES.

The holder of 120 20l. shares in a company having afterwards become entitled to sixty additional 2l. shares, instructed his broker to sell the latter. The broker obtained from him blank transfers with stamps sufficient to pass the 20l. shares, and filled in the blanks for the descriptions of the shares with those of the 20l. shares, leaving the names of the transferees in blank. The shares were purchased by jobbers, the blanks for the names of the transferees remaining in blank, which appeared to be a common course of dealing. The jobbers afterwards sold them, and filled in the names of the ultimate purchaser. *Held*, that the transfer in blank was void, and that the first-mentioned holder was entitled to have the shares delivered up, and their registration in the name of the purchaser restrained.¹ *Held*, also, that any equities arising from the conduct of the first holder could not be set up as a defence to a suit by him for the above purposes, but could only be insisted upon (if at all) by cross bill.

THIS was an appeal from the decision of Vice-Chancellor WOOD, holding the plaintiff entitled to have delivered up certain transfers of shares purporting to have been executed by him, but which really had not been so executed as to bind him at law, and

¹ See *Swan v. The North British Australian Co.*, 2 H. & C. 175; *In re Barned's Banking Co.*, L. R. 3 Ch. Ap. 105; *Hawkins v. Maltby*, L. R. 3 Ch. Ap. 188, 194; s. c. L. R. 4 Eq. 572; *Hunter v. Walters*, L. R. 11 Eq. 319.

granting an injunction to restrain the registration of the shares in the name of the supposed transferee.

The statements of facts referred to in the judgment on * the appeal were contained in two affidavits of the plain- * 560 tiff to the following effect:—

Some time since the plaintiff became the owner of one hundred and twenty shares in the Great Indian Peninsula Railway Company, upon each of which the sum of 20*l.* was actually paid up, and which had been transferred into the plaintiff's name as the registered holder thereof. Afterwards the plaintiff became entitled to sixty new shares in the company, which were allotted to him subject to his paying a deposit of 2*l.* per share. The plaintiff gave Mr. Bourdillon, his stockbroker, a check for 120*l.*, with instructions to him to pay the deposit. In July, 1857, he instructed Mr. Bourdillon to sell the sixty new shares, and on the 30th of July Mr. Bourdillon brought to the plaintiff two printed forms of deeds of transfer, which the plaintiff signed, believing them to be deeds of transfer of the new shares, without, however, the numbers of the shares, the consideration or the name of any transferee being inserted.

On the 5th of August, 1857, the plaintiff received from Mr. Bourdillon a letter of that date, containing the following passage: "Before you start for Scotland be so kind as to let me know how and when you wish the 135*l.* paid." The 135*l.* referred to in the letter was the price which the plaintiff was informed by Mr. Bourdillon had been given for the new shares.

It afterwards appeared that the deeds had been filled up as transfers of eighty of the one hundred and twenty 20*l.* shares, one of the transfers being of fifty and the other of thirty of those shares. The word "thirty" appeared to be written in ink in one of the transfers over the word "ten" written in pencil, and the name of Percival Spurling, one of the defendants, had since the * execution of transfers by the plaintiff been in- * 561 serted as the transferee. The numbers of the shares and the considerations (which were to be 1000*l.* and 600*l.*) had also been inserted since the execution by the plaintiff.

The plaintiff never gave instructions or authority for the sale or transfer of any of the one hundred and twenty 20*l.* shares, nor did he ever wish to sell any of those shares, nor had any portion of the consideration for the purchase of them ever been paid to

or received by the plaintiff or by any person or persons whomsoever authorized or empowered by him to receive it.

Until the 17th of August, 1857, when the plaintiff was informed by the secretary of the company to the contrary, he believed that the sixty new shares had been taken up for and belonged to him, and thought that the proper certificates for the whole of the one hundred and twenty 20*l.* new shares had been delivered to him and were in his own custody, but he afterwards discovered, on calling at the company's office, that the certificates in his custody were merely transfer certificates, and that he was entitled also to share certificates, but that the share certificates for the one hundred and twenty 20*l.* shares had been obtained by Mr. Bourdillon from the company, and that eighty of them had been delivered to the defendant Percival Spurling.

On the 30th of July, 1857, when Mr. Bourdillon brought the plaintiff the two printed forms of deeds of transfer, he informed the plaintiff that the blank spaces in the transfers for the name of the transferee, and for the number and numbers of the shares, could not be filled up until it was known how the shares were to be divided.

* 562 * Shortly after receiving the notice of transfer of the eighty shares the plaintiff wrote to Mr. Bourdillon requesting an explanation, and received from him the following letters:—

“ 17th August, 1857.

“ I cannot express to you my utter amazement at your letter of this morning, and I need not tell you I lost no time in posting off to the office, and there found true enough that the wrong stock had been transferred. The mistake was owing, first, to the description of the deed not having specified the 2*l.* shares in particular; secondly, the jobber, believing that I had sold him eighty, had inserted fifty in one deed and thirty in the other, and there being no such number of 2*l.* shares as eighty in your name, this circumstance had aided the mistake. I am very glad you wrote to me at once, and am only sorry that you should have had any trouble in the matter. The fault, as far as the stock is concerned, is mine, and I ought to have inserted the right shares myself. The matter will at once be set right. I shall have to transfer twenty more 2*l.* shares myself, as the jobber insists that I sold him eighty and not sixty; however, this is no very

great hardship. The money will be paid to me in the course of a day or so, and I will then place it to your account with the London Joint-Stock Western Bank.

“ 20th August, 1857.

“ I find there is greater difficulty in arranging this transfer matter than I had anticipated ; it is clear that eighty 20l. shares have passed by the transfer, and, in point of fact, the jobber, to complete his part of the contract, has paid me accordingly. The only way now to rectify this is by your allowing the transfer to pass at * once, and I will at your option either remit * 563 you the amount or else repurchase and send you a transfer of a similar number of 20l. shares, as I am bound to admit that this has arisen through my carelessness. I should be glad if you would at once withdraw the letter you sent to the railway company prohibiting the transfer to Mr. Spurling. The irregularities may subject me to very strong animadversion from the committee of the Stock Exchange unless the matter is thus arranged forthwith. I regret exceedingly that this circumstance should have arisen ; you must put it down to the hurry of business.”

The bill, after stating to the effect of the above-mentioned affidavits, prayed that it might be declared that the two deeds of transfer were void, and that the plaintiff was entitled to the shares, and that the deeds might be delivered up to be cancelled. It also sought an injunction to restrain the company from making or continuing the name of the defendant Spurling in their books as the transferee, holder or owner of the shares.

The defendant Spurling and another defendant named Bristowe (who were jobbers) admitted having had various dealings and transactions with Bourdillon previously to the month of July, 1857, that Bourdillon was then in good credit on the Stock Exchange ; and that at the time of the sale Bourdillon told Spurling and Bristowe that he had the shares in question for sale as a broker, but the defendants said that they did not ask him whose shares they were ; nor ask him to produce his authority to sell them ; nor did they inquire then or afterwards of Bourdillon, or at the company's office, whether the plaintiff had any other shares in the railway company than the 20l. shares sold to them by Bourdillon. The defendants further said, that they

* 564 * requested Bourdillon to get the transfers executed in blank, according to the custom existing on the Stock Exchange between jobbers and brokers, for convenience to enable the latter to sell the shares again. They said that on the 30th of July, 1857, Spurling and Bristowe settled their account with Bourdillon according to the usual course of business on the Stock Exchange, and that there was then a balance, including the purchase-money for the shares, of 1623*l.* 4*s.* 5*d.* due from the defendants Spurling and Bristowe to Bourdillon, which the defendants paid him, and that Bourdillon then handed to the defendants the two deeds of transfer, together with the share certificates for the eighty shares.

It was admitted, that at the time the two deeds were handed over to the defendants by Bourdillon they were respectively in blank as to the consideration-money and the name of the transferee, and that these particulars were filled up by the defendants after the transfers had been executed by the plaintiff, and subsequently to their being handed over to the defendants by Bourdillon.

On behalf of the defendants, Mr. Wilkinson, a stock and share dealer on the Stock Exchange, stated that for several years last past he had been very extensively engaged in the purchase and sale and transfer of shares in the various railway and other public companies, the shares in which are salable on the London Stock Exchange. He said that it was the constant practice of brokers and stock-dealers on the Stock Exchange to have the transfers of shares which they have to sell executed by the vendors in blank, and to fill in the name of the purchaser, the amount of the consideration-money, and the particulars of the shares intended to be sold, after the bargain made with the purchaser. He said that a broker having in his possession the certificates of shares proposed to be sold, and a blank deed

* 565 of transfer * executed by the person in whose name the shares stand, was, according to the invariable practice and usage of the Stock Exchange, considered and dealt with as the authorized agent of such person to sell and receive the purchase-money for the shares, and that this usage and custom was so firmly established that it was daily acted upon. The witness said that he had himself frequently acted upon this custom, and bought and sold shares upon the credit of blank transfers signed

by the vendors, and that it would, as he verily believed, most materially interfere with the course of business on the Stock Exchange, and introduce great delay and difficulties in the transaction of business, if the practice should be interfered with. He further stated, that he was acquainted with the circumstances under which the defendants Spurling and Bristowe purchased from Mr. Bourdillon the shares in question; and that, according to the course of business on the Stock Exchange, the defendants Spurling and Bristowe were perfectly justified in treating with Mr. Bourdillon as the authorized agent of the plaintiff to sell the shares, and in paying to him the purchase-money in exchange for the certificates and the blank transfers signed by the plaintiff.

On cross-examination the witness said that he could not recollect any particular instance where a transfer had been executed by the vendor without the name of the transferee, and without the amount of the consideration, and without the number of shares being inserted. He said that in taking a transfer a dealer wished to be able to get a person to purchase, and then to give his name as transferee; and that the dealer did not wish to give his own name, because he did not wish to pay the extra stamp.

Another share-dealer, named John Hawkins, stated to the same effect.

* The case came before the Vice-Chancellor on a motion * 566 for an injunction, which by arrangement was turned into a motion for a decree, and his Honor ordered in substance according to the prayer of the bill.

The defendants appealed from the whole decree.

Mr. Rolt, Mr. W. M. James, and Mr. Walford, for the plaintiff, the respondent. — First, the deeds of transfer being in blank at the time when they were executed by the plaintiff, passed no interest whatever in the shares to the defendants; and the deeds having been materially altered by the defendants after the plaintiff had executed them, were invalid and void at law. They could, therefore, confer no title upon the defendants. Secondly, Bourdillon was not the plaintiff's authorized agent for the sale of the 20l. shares; and thirdly, there was no contract between plaintiff and defendants for the sale of the eighty 20l. shares. The cases as to blank acceptances were relied upon below on the

other side, but are quite distinguishable. It is true that a person giving an acceptance is bound if the bill of exchange falls in the hands of a *bona fide* indorsee; but when a bill has been accepted, filled up and handed to the holder, it is in regular form, and he has no means of knowing that its mode of acceptance was out of the ordinary course, there not being any thing on the instrument to show or lead him to suspect that such was the case, and therefore to hold that he, after he had lent his money on the faith of such an acceptance, had no right of action in respect of it against the acceptor would be unjust. The acceptor in such a case is the only person who has been guilty of any negligence, and therefore he alone has to suffer by it. But this would

not be the case if the holder before taking the bill and
 * 567 * parting with his money had notice of the manner in which the bill had been accepted, and it afterwards turned out that the blank acceptance had been filled up for a much larger amount than that authorized by the acceptor. *Hatch v. Searles.* (a) Here the defendants clearly had notice of the defective state in which the deeds were when signed by Mr. Tayler. Moreover, the law as to alterations in deeds is not the same as that respecting simple contracts, and the instruments with which we are dealing are instruments under seal.

Reliance was placed in the argument below on the case of *Young v. Grote.* (b) In that case, however, a person having signed a blank check left it with his wife to fill in the amount as there might be occasion, and she filled it in for 50*l.* 2*s.*, but she commenced the word fifty in the middle of a line and with a small letter, thereby making it easy for any one to insert any thing before the fifty, which the clerk who took it to be cashed did by adding three hundred, thereby making it a check for 350*l.* 2*s.* It was under these circumstances held, that the banker having paid the larger sum, and there being nothing in the appearance of the check to raise any suspicion of a fraud having been committed, the customer, and not the banker, must bear the loss. That authority cannot apply to a case where the instrument when it came to the hands of the claimants was void upon the face of it.

They referred also to *Hibblewhite v. M' Morine.* (c)

(a) 2 Sm. & Gif. 147. (b) 4 Bing. 253. (c) 6 M. & W. 200.

Mr. R. Palmer, Mr. Giffard, and Mr. Waley, for the appellants. — The plaintiff when he signed the stamped deeds in blank must be taken to have authorized his broker to * fill them up with any shares that the stamps would cover. * 568 There is no difference in equity between this case and that of a blank acceptance. In the latter the acceptor is held liable upon to any amount that the stamp will cover, even though it be fraudulently filled up, and the authority to fill it up to that amount is held to be vested not merely in the person to whom it may have been handed, but in any person into whose hand the blank acceptance may come. *Schultz v. Astley*. (a) *Hibblewhite v. M' Morine* (b) only decides that there is no title at law under a deed executed in blank, and that authority leaves the equitable question untouched. It is a usual course of business to execute transfers in blank, and although this custom cannot make a document a deed which is not one at law, it cannot be disregarded in equity as evidence of agency and of contract apart from legal title. How can a purchaser be bound to know the limitation placed upon the agent's authority? The plaintiff, having been the means of misleading the defendants, cannot have relief against them in equity. His claim is either at law or in equity: if at law, he cannot come here to enforce it, and if in equity he must show a better equity than that of the defendants to disturb their possession, and this he cannot do.

They referred to *Duke of Beaufort v. Neeld*, (c) *Rice v. Rice*, (d) *Perry-Herrick v. Attwood*, (e) *Lickbarron v. Mason*, (g) *Humble v. Langston*, (h) *Pickering v. Busk*. (i)

Mr. J. H. Palmer, for the company.

Mr. W. M. James, in reply.

July 15.

* THE LORD JUSTICE KNIGHT BRUCE. — In this case the * 569 material facts are undisputed, nor is there any question of

(a) 2 Bing. N. C. 544.

(b) 6 M. & W. 200.

(c) 12 Cl. & Fin. 248.

(d) 2 Drew. 78.

(e) 1 De G. & J. 21.

(g) 2 Term R. 68.

(h) 7 M. & W. 517.

(i) 15 East, 88.

legal right. The controversy is as to equitable procedure and the application of equitable principles merely, the bill being for relief in respect of documents purporting to affect, though not in truth affecting, the legal title to eighty shares in the Great Indian Peninsula Railway Company, vested legally in the plaintiff, and to remove a cloud from his title. The main facts appear in two affidavits made by the plaintiff in August, 1857, and April, 1858, respectively, from which it may be as well to read these extracts. [His Lordship read the portions of the affidavits, the substance of which is above set out.]

The plaintiff was beneficially as well as legally the owner of the eighty shares in dispute when the two documents purporting to be deeds of transfer of those shares respectively were prepared, that is to say, before the preparation of either. His legal ownership has continued ever since and now remains, for it is not nor has been affected by either document, since, if either was at any time the "deed" of the plaintiff, it ceased to be so from the moment when the words and figures written upon the documents after the 30th of July, 1857, were so written: those words and figures including the price and the name of the purchaser. It was on the 30th of July, 1857, that the plaintiff signed, sealed, and delivered the two documents, and it is I think, clear *prima facie* that the plaintiff having never intended to sell nor authorized a sale or contract for sale of the eighty shares, or any one of them, and having received no price or consideration for them, or any of them, but having in respect of them and of the documents of transfer been grossly defrauded by Mr.

* 570 Bourdillon, a fraud in which the appellants *innocently and undesignedly, though imprudently, participated, is entitled to the relief against the defendants the railway company, which the decree under appeal gives him.

They do not object, and one of the three other defendants, namely, Mr. Percival Spurling, is indifferent on the subject, since as among those three gentlemen the risk, if any, and benefit, if any, of the suit belong to the other two, for whom it is argued that they, by reason of the plaintiff's imprudent conduct, (for neither did he act prudently), have an equitable title to the shares superior to his, and that therefore the bill ought to be dismissed.

There appeared to me to be at least two impediments in the

way of these defendants, first, that, circumstanced as the title and constituted as the suit is, the nature of their claim renders it inadmissible by way of defence without a distinct bill or cross suit, and, secondly, that the appellants must be deemed to have had notice, at least in and by the very act of making in the two documents of transfer the additions which soon after the 30th of July, 1857, were made to them, that a legal title to the shares or any of them as against the plaintiff was not acquired nor could be acquired without some subsequent act on his part. But there was no such subsequent act. I agree therefore with the decree. The company must have their costs of the appeal against the appellants. I am not for giving any other costs of it beyond the deposit.

THE LORD JUSTICE TURNER. — This bill is filed by the plaintiff for relief against the consequences of a fraud practised upon him by his stockbroker, and for preventing the consummation of that * fraud. There are two classes of shares in the * 571 Great Indian Peninsula Railway Company, paid-up shares of 20*l.* each, and new shares upon which 2*l.* only has been paid. The plaintiff was the owner of 120 of the paid-up 20*l.* shares, and he supposed himself also to be the owner of sixty of the new shares, which would have belonged to him but for a previous fraud committed by the same broker, which had not been detected. The plaintiff intended to sell the sixty new shares, and for this purpose he executed, on the application of his broker, two deeds of transfer of shares in the company. These deeds, when executed by the plaintiff, were in blank as to the number of shares to be transferred, the numbers of the shares in the company's books, and the names of the transferees, and they bore stamps of sufficient amount to cover the transfer of eighty paid-up 20*l.* shares, a fact which the plaintiff failed to observe. The plaintiff's broker, having procured from him the deeds of transfer executed in blank as above stated, went into the market and in fraud of the plaintiff sold to the defendants Stephen Spurling and Thomas Lynn Bristowe, who are dealers in shares eighty of the plaintiff's 120 paid-up 20*l.* shares, receiving from Messrs. Spurling and Bristowe about 1600*l.*, the amount of the purchase money, for which of course he did not account to the plaintiff.

It appears that it is a common, perhaps an universal, practice

on the Stock Exchange between the brokers and jobbers, or dealers in shares, for the broker or dealer who sells to deliver the deed of transfer of the shares to the dealer who purchases in blank as to the name of the transferee, leaving the name to be filled in when the dealer who purchases may himself find a purchaser for the shares; and on the plaintiff's eighty shares

* 572 being sold to Messrs. Spurling and Bristowe the * plaintiff's broker delivered to them the deeds of transfer filled up as to the number of shares transferred, fifty shares being inserted in one of the deeds and thirty in the other, but still in blank as to the number of the shares in the books of the company and as to the names of the transferees. The plaintiff during all this time had in his possession the certificates of the transfer to him of the 120 shares, which he appears to have considered as the title-deeds of those shares, but the actual certificates of those shares had remained in the possession of the company, and the plaintiff's broker, without his sanction or authority, obtained them from the company and delivered them to Messrs. Spurling and Bristowe. Messrs. Spurling and Bristowe soon afterwards disposed of the shares to Mr. Percival Spurling, from whom, however, they have since got them back again, and thereupon the numbers of the shares in the books of the company, and the name of Mr. P. Spurling as transferee, were inserted by the defendants in the deeds of transfer.

Mr. P. Spurling then proceeded to have the shares registered in his name, but before the registration was complete, the plaintiff, having accidentally discovered the fraud which had been practised upon him, filed this bill for an injunction to restrain the registration being further proceeded with, to have the deeds of transfer declared void and delivered up to be cancelled, and to have the share certificates delivered up to him, and all necessary acts done for restoring his name in the books of the company as the owner of the shares. The further proceeding with the registration having been stayed, and the cause heard before the Vice-Chancellor Sir WILLIAM PAGE WOOD, his Honor made a decree in effect according to the prayer of the bill. The

* 573 * case comes before us upon an appeal on the part of the defendants Spurling and Bristowe from this decree.

This is one of those unfortunate cases in which the fraud of a third person brings a loss upon others who are innocent of the

fraud, and the question is on whom the loss is to fall. That these deeds of transfer, when filled up by Messrs. Spurling and Bristowe, were not the deeds of the plaintiff admits of no question. The law on that point is perfectly settled, and it would be most dangerous in any way to unsettle it, for the safety of property depends upon it, and unless it be upheld every man's property will be at the mercy of those into whose hands his deeds may fall. This very case presents a remarkable instance of the wisdom of the rule of law upon the subject. To permit the practice of stock-brokers or stock-jobbers to prevail against the law is of course out of the question. They must, like every one else, be bound by the law and abide by and observe its rules.

It is to be considered, then, what is the consequence in this case. It is this, that the plaintiff's title to these shares remained wholly undisturbed. He continued to be the legal owner of the shares notwithstanding the deeds of transfer, and being the legal owner, he must be entitled to the relief prayed by this bill unless he has in some manner not merely created an equity against himself, for that would be the subject of a cross-bill, but has actually disentitled himself to sue in this Court for that relief.

It was said that the plaintiff has so disentitled himself because he executed the deeds of transfer in blank and placed them in the hands of his broker, and several cases were cited to show that the authority given to *an agent cannot as to *574 third persons be limited by private instructions, and that it is a general principle that whenever one of two innocent persons must suffer by the acts of a third, he who has enabled the third person to occasion the loss must sustain it.¹ These, no doubt, are very good and very sound general principles, and I should be sorry to say one word in any way dissenting from them, but the question in this case seems to me, not upon the principles, but upon the application of them. These principles are established for the purpose of protecting persons who might otherwise be defrauded, and they must not be wrested to the purpose of facilitating the practice of fraud. They might well apply to this case if the plaintiff's broker had before the sales, and without the knowledge of these defendants, filled in,

¹ See *Layard v. Mand*, L. R. 4 Eq. 404; *Wall v. Cockerell*, 3 De G., F. & J. 737; s. c. 10 H. L. Cas. 229; *Adsetts v. Hines*, 33 Beav. 52; *Griswold v. Haven*, 25 N. Y. 595; *Kerr F. & M.* (1st Am. ed.) 186 *et seq.*

not merely the number of shares transferred, but also the numbers of the shares in the books of the company and the names of the transferees; but to apply them in favour of these defendants under the circumstances of this case would be to apply them in favour of persons who were not and could not be defrauded, for of course these defendants must be taken to have known that the deeds of transfer when filled up by them could have no legal validity. If we were to apply to this case the principles of the cases referred to, we should, as it seems to me, be extending the rules beyond the reason of them, and facilitating, instead of defeating, the practice of fraud. These defendants, having knowingly taken transfers of these shares without title, cannot justly say that they have been defrauded.¹

I agree, therefore, in the decision of the Vice-Chancellor; but there has been so much negligence on the part of the plaintiff, that I think the appeal should be dismissed without costs, except as to the deposit, which must go to the respondent, and the appellants must pay the costs of the company.

* 575 *In the Matter of The JOINT-STOCK COMPANIES
WINDING-UP ACTS, 1848 and 1849,
and
In the Matter of The ROYAL BRITISH BANK.

MIXER'S CASE.

1859. July 16. Before the Lord Chancellor Lord CAMPBELL and the LORDS JUSTICES.

The charter of a company empowered the directors to increase the capital by the issue of new shares of 100*l.* each, but not by less than 10,000*l.* at a time, and it was provided, that the additional capital derived from such new shares should not be published and declared as a portion of the capital of the company till the Board of Trade was satisfied that the whole amount

¹ See *Cottam v. Eastern Counties Railway Co.*, 1 J. & H. 243; *Case v. James*, 3 De G., F. & J. 264; *Spaight v. Cowne*, 1 H. & M. 359; *Dowle v. Saunders*, 2 H. & M. 250; *Hunter v. Walters*, L. R. 11 Eq. 319; *Kerr F. & M.* (1st Am. ed.) 137, 138; 1 Story Eq. Jur. § 390 *a.*

of the increase of capital from time to time determined on had been subscribed for the shares issued, at least 50*l.* per share paid up, and a supplementary deed executed by the persons taking the shares. An issue of 2000 new shares was determined upon, the subscribers to be entitled to 5*l.* per cent. interest on the sums paid by them until they had paid up 50*l.* per share, and afterwards to participate in dividends. M. took some of them, paid up 50*l.* per share, and executed a supplementary deed, obtained certificates of shares and received interest, but only a small part of the 2000 shares were ever subscribed for. The sums received in respect of them were entered in the reports under the head of liabilities. *Held*, that M. was a shareholder liable to be placed on the list of contributories, and not entitled to rank as a creditor for what he had paid.

The directors of a company from time to time made to the general meetings of shareholders and printed and published false and fraudulent reports of the affairs of the company. There was nothing to show that the shareholders were aware of the falsehood of these reports. An issue of new shares being made, M. was induced by these reports to take some of them. *Held* (overruling *Brockwell's Case*, 4 Drew. 205), that, notwithstanding the fraud, he was liable to be placed on the list of contributories.¹

THIS case was brought before the full Court in the first instance at the request of Vice-Chancellor KINDERSLEY, the questions being, whether Mr. Mixer was a contributory of the Royal British Bank, and also, whether he was a creditor on moneys paid by him in respect of shares allotted to him.

The bank was established under 7 & 8 Vict. c. 113. The original charter of incorporation was dated the 17th of September, 1849, and recited the deed of settlement, by the second clause of which it was provided, "that the capital or joint stock of the company for commencing * business should be * 576 100,000*l.* divided into 1000 shares of 100*l.* each, such capital to be increased if need were by the creation of additional shares as therein mentioned, and that the shares which at the date thereof had not been subscribed for, and also those which might thereafter be created as thereafter provided, should be allotted to such persons and in such manner and on such terms as the court of directors should think best for the interest of the company, and that all profits arising therefrom should be carried to the 'surplus or reserved fund.'" By the 6th clause it was provided, "that every member of the company, immediately on obtaining an allotment of any shares, other than the said shares

¹ See *Oakes v. Turquand*, L. R. 2 H. L. 325; Kerr F. & M. (1st Am. ed.) 48, 49.

to be classed and distinguished as thereafter directed, should pay to the court of directors, or as they should direct, the sum of 10*l.* in respect of every share so allotted, and that the holder of every such share should pay the further sum of 90*l.* in respect thereof at such times and in such instalments and generally in such manner as the court should require, but that, after the sum of 50*l.* should have been paid up in respect of each such share, no call for further payment thereon should be made except by a resolution passed by the vote of a majority of at least three-fourths of the whole number of the court of directors." By the 65th clause it was provided, "that it should be lawful for the court of directors, from time to time, with the consent of three-fourths in number and value of the shareholders present at a general meeting specially convened for the purpose, to present a petition to Her Majesty in council, praying for leave to increase the capital of the company by creating additional shares to such extent not exceeding in the whole 19,000 shares of 100*l.* each as they might think proper; and that in every such petition should be stated the amount of capital proposed to be raised, the number of shares

proposed to be issued for the purpose, and the proposed
* 577 amount of each share * not being less than 100*l.*; and that if

Her Majesty should see fit to sanction the proposed increase of capital, either by the issue of a supplementary or subsidiary charter, or in any other manner, the owners of all new shares so created should be bound by the terms of the deed and should be subject to the same liabilities as the original or previous shareholders of the company, and that one-half of the amount of such shares should be paid up on or before issuing the certificate thereof, and that it should not be lawful for the company to repay the sum so paid up, or any part thereof, without the consent of the Lords of the Committee of Privy Council for Trade signified by order of the Lords of the said Committee." The charter confirmed the provisions of the deed of settlement and incorporated the bank for the term of twenty years.

On the 22d of July, 1850, an extraordinary general meeting of shareholders was held, at which resolutions were passed for making some alterations in the deed of settlement and for presenting a petition for leave to increase the capital by creating additional shares to such extent, not exceeding in the whole 19,000 shares of 100*l.* each, as the directors should think proper, and these

resolutions were confirmed at another extraordinary meeting on the 13th of August, 1850.

On the 17th of September, 1850, the directors passed a resolution to present a petition for the above purpose, and also a resolution that it would be proper that not less than 1000 shares of 100*l.* each, of which one moiety of 50*l.* per share should be paid before allotment or issuing the certificate, should be the number of shares to be issued and amount of additional capital to be in the first series of new or additional shares.

* In October, 1850, a petition was accordingly presented * 578 to Her Majesty in council.

On the 8th of March, 1853, the directors passed a resolution that payments on account of new shares should be received at 5*l.* per centum per annum interest, payable half-yearly until the issue of the new certificates.

On the 23d of February, 1855, a supplemental charter was granted, whereby it was provided "that the said corporation shall be at liberty to increase the capital of the Royal British Bank at such time or times, and to such amount from time to time not exceeding in the whole 500,000*l.* beyond the original and existing amount thereof, as the court of directors of the said bank for the time being shall order and direct in that behalf, by creating additional shares of 100*l.* each, but so as that no such increase of capital shall be ordered and declared at any one time for any one sum being less in amount than the sum of 10,000*l.* Provided and subject always to the condition, that before the certificate of any additional share be issued the holder of such new share shall have executed the original or supplementary deed of constitution of the corporation and shall have paid up one-half of the amount of such share according to the directions of the before-mentioned Act" [the 7 & 8 Vict. c. 113]. "And further, that the additional capital to be derived from such additional shares (except as regards any returns necessary by law to be made) shall not be in anywise stated, published and declared as a portion of the capital stock of the said corporation until it shall be proved to the satisfaction of the president of the Board of Trade that the whole amount of such increased capital from time to time so determined on as aforesaid has been actually subscribed for, and the shares issued, and at least 50*l.* per share paid up, and such supplementary deed executed * as aforesaid by * 579

the parties taking such shares, such satisfaction to be testified in writing by one of the secretaries to the said board."

On the 6th of March, 1855, the directors issued to the shareholders, and to many of the customers of the bank, including Mixer, a circular stating that the supplemental charter had been obtained and that the directors had determined to make an addition of 300,000*l.* to the capital, and were prepared to receive subscriptions for new shares.

The issue of the first set of 1000 new shares was completed about the 12th of June, 1855, and a supplementary deed of settlement was executed by the persons taking them.

On the 19th of June, 1855, the directors certified to the Board of Trade, that the 100,000*l.* had been subscribed for, 1000 shares taken, and 50*l.* on each paid up. After this the 1000 shares were included in the capital in the report issued by the directors, but previously the moneys received in respect of these shares had been entered under the head of "liabilities" as "amount due by the bank for deposits on account of new shares." Another set of 1000 were issued before September, 1855, and in December, 1855, a supplementary deed of settlement was executed as to them, the persons who took them having all paid up 50*l.* per share, and a certificate was sent to the Board of Trade, as on the former occasion.

In September, 1855, the directors sent a circular to the shareholders and customers of the bank, announcing a further issue of 2000 shares, in addition to the 2000 new shares already
* 580 issued. Mixer, who was a customer, *received' this circular, the material part of which was as follows:—

"The directors have resolved to add 2000 to the existing number of shares, making in all 5000, and the capital half a million, that these additional 2000 shares shall be first offered to the present proprietors and customers of the bank, up to the 10th day of October next, and be allotted in the order of priority of application, at a premium of 5*l.* per share, to be added to the reserve fund of the bank. Ten pounds per share must be paid on application, and the remainder by instalments at the convenience of the allottees, on or before the 30th of June next; 4*l.* per cent interest will be allowed on the several payments

until all have been completed, from which time the allottees will participate in the next declared dividend."

On the 15th of September, 1855, Mixer made an application in writing in the prescribed form for twelve new shares, and two days afterwards received from the secretary a notice that they had been allotted to him. On the 4th of October, 1855, he paid the deposit of 10*l.* per share.

About the 28th of June, 1856, Mixer paid up the remainder of the 50*l.* per share on his shares, and on the 30th he received his certificates and executed a supplementary deed of settlement. This deed was expressed to be made between the persons whose names and addresses were set forth in the schedule of the one part, and the Royal British Bank of the other part, but was not executed by the bank, was dated only 1856, without specifying the month or day, and did not contain any thing to show to how many shares it was intended to relate, nor what amount of additional capital was to be * included in it. At the * 581 time when Mixer executed it, only sixty-two shares had been subscribed for towards the third issue, and only 129 at the time when the bank stopped payment. Mixer was credited in his pass-book with interest on the sums he had paid, the last entry of such interest being on the 28th of August, 1856. The amount which he had paid was, in the balance sheet published on the 1st of August, 1856, included in an item of 842,428*l.* 12*s.* 3*d.*, entered among the liabilities of the bank and intituled "Amount due by the bank for deposits on account of new shares and for fixed periods on drawing accounts, on promissory and circular notes, and acceptances from customers." In the same balance sheet was this item, "To subscribed capital 300,000*l.*, whereof one-half paid up, 150,000*l.*" In the case of each former issue of new shares, the moneys paid in respect of them had been entered in the accounts as a liability of the bank until the shares had all been subscribed for and half the amount paid up, and it was not until that had been done and certified to the Board of Trade that the new shares were declared part of the capital.

Mixer's name was never entered in the share register, nor returned to the stamp-office among the names of the shareholders, but the balance sheets and reports were sent to him, and he attended meetings on the 1st of August, 1856, and the 20th of

September, 1856, the latter meeting being after the bank stopped payment, which event took place on the 8d of September, 1856.

On the investigation which took place after the stoppage, it appeared that from the time of the original formation of the bank the directors had in their annual reports and balance sheets, which were from time to time printed and published, grossly falsified the accounts of the bank and made it appear
 * 582 most prosperous when it * was in reality hopelessly involved. In December, 1854, the directors issued a report representing the company as in possession of a considerable capital and as in a flourishing condition, when in fact all or nearly all the capital which had been subscribed up to that time had been lost. Mixer positively deposed that he had taken shares on the faith of the representations thus made by the directors as to the state of the bank. There was not, however, any thing to show that the original shareholders as a body had been in any way privy to the fraudulent representations of the directors. On the contrary, there was reason to believe that they had been as much in the dark as the new shareholders as to the real state of affairs.

The official manager took out a summons to have Mixer put on the list of contributories, and Mixer took out a summons to be allowed to prove as a creditor for the amount paid by him in respect of the shares. The summonses were adjourned into Court, but the Vice-Chancellor KINDERSLEY desired that an application should be made to the full Court of appeal to hear them, to which application their Lordships acceded. It was agreed that all the facts on which the Vice-Chancellor relied in *Brockwell's Case* should be admitted for the purposes of the present case.

Mr. Giffard and *Mr. Leonard Field*, for the appellant. — We rely on two grounds, (1) That Mr. Mixer only entered into a conditional contract to take shares; (2) that he is entitled to be released from his contract on the ground of fraud.

The issues of new shares which the supplemental charter gave power to issue for the purpose of increasing the capital were not to be less than 10,000*l.* each time, and none of the money paid for them was to be treated as capital till the whole issue
 * 583 had been taken and half * the amount paid up. Whoever therefore took any newly-issued shares, took them subject

to a condition that the whole issue should be taken and one-half paid up; and the course of dealing of the company was in each case to treat the payments by a subscriber for new shares as a loan till the whole issue had been taken and half the amount paid up, the subscribers not becoming shareholders till then. Now, as regards the shares of which Mr. Mixer took some, this condition was never complied with: he was, therefore, a lender, not a shareholder. Then, as to fraud, our case is stronger than *Brockwell's Case*. (a)

[THE LORD CHANCELLOR. — Has not the authority of that case been much shaken?]

That may be so, but in *Nicoll's Case* (b) Lord Justice TURNER laid down a proposition somewhat more limited than the decision in *Brockwell's Case*, and we come within it. Then, apart from fraud, the cases at law, *Nockels v. Crosby*, (c) *Fox v. Clift*, (d) *Pitchford v. Davis*, (e) *Walstab v. Spottiswoode*, (g) *Wontner v. Shairp*, (h) *Jarrett v. Kennedy*, (i) *Chaplin v. Clarke*, (k) and *Ashpitel v. Sercombe* (l) establish that when persons take shares on the faith of a prospectus, which represents the capital as being of a definite amount, they are not shareholders unless the whole amount is paid up, and here the circular of September contained such a representation.

[LORD CHANCELLOR. — Do you contend that if a single share remained unallotted, the takers of the new shares would not be shareholders?]

That, we submit, is the effect of the circular as well as of the supplemental charter. Moreover, one condition in the charter is, that every shareholder shall execute a deed. Now, the instrument which * was executed by Mixer was no deed * 584 at all, the date being left in blank and the amount of capital to be subscribed not being stated. On these grounds we say the contract to become a shareholder was subject to a condi-

(a) 4 Drew. 205.

(b) 3 De G. & J. 387.

(c) 3 B. & C. 814.

(d) 6 Bing. 776.

(e) 5 M. & W. 2.

(g) 15 M. & W. 501, 515.

(h) 4 C. B. 404.

(i) 6 C. B. 319.

(k) 4 Exch. 408.

(l) 5 Exch. 147.

tion precedent, which is now incapable of being performed, and, therefore, Mixer never became a shareholder.

Mr. Glasse, Mr. W. D. Lewis, and Mr. Joseph Brown, for the official manager. — *Walstab v. Spottiswoode* and the other cases of that class are irrelevant, for this was not an agreement to take shares in an inchoate company, and it is to such a transaction only that those cases relate. Here the appellant executed the deed, received dividends, and voted as a shareholder. The contract as regarded him was complete when he received his certificates, and there was nothing left conditional; what the appellant relies on as a condition, is a condition between the Board of Trade and the company, not between the company and the takers of shares. *Macbride v. Lindsay*. (a) This case has more resemblance to *Clarke v. Dixon*, (b) and *Deposit Life Assurance Society v. Ayscough*, (c) than to the cases to which the appellant compares it. But suppose that the provisions of the supplemental charter do affect the title of the new shareholders, we submit that the conditional construction for which the appellant contends is not the true one. That construction makes the title of every individual subscriber depend on the acts of other subscribers, makes it contingent upon every member of a large body keeping his contract, which is so monstrous a result that the

Court will not, without absolute necessity, adopt a construction which leads to it. The language does not * require it, and, moreover, it is inconsistent with the 65th clause of the original charter, which expressly provides, that none of the deposits shall be repaid without the consent of the Board of Trade. The circular is not so expressed as to make the contract conditional, and the letter of application for shares and the allotment of them were in simple and absolute terms. The contract was never understood to be conditional, each subscriber, on paying up his 50*l.* per share, executed the deed and received certificates, which he could sell. The supplemental charter speaks of persons in the appellant's situation as "holders of shares." Then as to the case of fraud, this was the fraud of the directors, not of the shareholders. Moreover, the contract has been acted upon so far, that the parties cannot be replaced in

(a) 9 Hare, 574.

(c) 6 E. & B. 761.

(b) 1 El. Bl. & El. 148.

their former position, and the contract therefore cannot now be avoided. As against a creditor, it is no defence to a shareholder that he was induced by fraud to take these shares. *Henderson v. Official Manager of the Royal British Bank*, (a) *Powis v. Harding*, (b) *Daniell v. Official Manager of the Royal British Bank*, (c) and he being liable to creditors must be liable to contribution as towards the other shareholders. A contract cannot be rescinded on the ground of fraud when the parties can no longer be replaced *in statu quo*. *White v. Garden*, (d) *Stevenson v. Newnham*. (e)

Mr. L. Field, in reply.

THE LORD CHANCELLOR. — I am of opinion that the appellant is not entitled to prove for the sums he has advanced, and that his name * ought to be on the list of contributories. * 586 He must be considered as having become a shareholder, in June, 1856. It appears to me that the questions arising on the supplemental charter, which have been relied on in support of the contention that he never became a shareholder, arise as between the Crown and the directors, not as between the directors and the shareholders. Beyond this, I am satisfied that the construction for which *Mr. Giffard* contended is not the right construction of the supplemental charter. It would be absurd to make the title of one shareholder depend upon what passed between the directors and other shareholders.

The appellant, however, further contends, that he was induced by fraud to take shares, and is entitled to relief on the ground of that fraud. Clearly there was fraud, and gross fraud, on the part of the directors, and I have no doubt that he was induced by fraud to take his shares. I think, however, that it was a fraud on the part of the directors which cannot be attributed to the company. Supposing it to have been a fraud on the part of the company, I do not think that the appellant is now entitled to avail himself of it and rescind the contract. It is a settled rule that a contract obtained by fraud is not void, but that the party defrauded has a right to avoid it if he does so while matters can

(a) 7 E. & B. 856.

(d) 10 C. B. 919.

(b) 1 C. B., N. S. 533.

(e) 18 C. B. 285.

(c) 1 H. & N. 681.

be replaced in their former position.¹ In each case we must look to see whether the contract has been acted upon. If it has been acted upon by the party defrauded so that others who are interested cannot be restored to their former rights, the contract cannot be rescinded, and nothing remains to the party defrauded but a reparation in damages. In the present case, Mr. Mixer acted on the contract; he executed the deed, he received dividends which were called interest, and in some sense might properly be called so, and thus he derived a benefit from * 587 his contract. He obtained his *certificates, which he might have sold, and if the concern had been prosperous sold at a profit. Even after the bankruptcy he did not say he would repudiate the contract, but made a complaint that he was not well treated as a shareholder. In my judgment he is a shareholder, must remain on the list of contributories, and cannot prove as a creditor. .

THE LORD JUSTICE KNIGHT BRUCE. — In my judgment, also, this gentleman manifestly is a contributory and is not a creditor.

THE LORD JUSTICE TURNER. — In my opinion, also, Mr. Mixer's contention fails on both points. The contract into which he entered, if originally conditional, had ceased to be so long before the company stopped payment. The only doubt I felt upon this part of the case arose upon the stipulation for payment of interest, but the contract was that he should have interest on what he had paid until the 50% on each of his shares was paid up, so that what he received was in fact a dividend under the name of interest.²

As to the question of fraud, I was afraid that I might in *Nicoll's Case* have expressed myself in a way calculated to produce a wrong impression, but on referring to my remarks in that case I

¹ See *Rawlins v. Wickham*, 8 De G. & J. 322; *Western Bank of Scotland v. Addie*, L. R. 1 Sc. App. Cas. 156; *Oakes v. Turquand*, L. R. 2 H. L. 346; *Kerr F. & M.* (1st Am. ed.) 48, 49; *Angell & Ames Corp.* (9th ed.) § 531, and notes. A stockholder who has been induced to take stock by means of misrepresentations in the prospectus of a company, should, if he wishes to avoid the contract, do so at once on ascertaining the facts. *Central Railway Co. v. Kisch*, L. R. 2 H. L. 99; *Smith's Case*, L. R. 2 Ch. Ap. 604; *Heymann v. European Central Railway Co.*, L. R. 7 Eq. 154.

² See *Rutland Railroad Co. v. Thrall*, 35 Vt. 536.

do not find any observation as to the effect of the subsequent conduct of the person who has been defrauded. *Grisewood's Case*, in which my learned brother and I gave judgment yesterday disposes of the present case so far as our opinion is concerned.

* WILSON v. KEATING.

* 588

1859. July 9, 16. Before the Lord Chancellor Lord CAMPBELL and the LORDS JUSTICES.

An arrangement having been made between the managing director of a bank and S., that the managing director should procure the transfer of 4000 shares to S. or his nominees, the shares to be paid for by S. W., one of the shareholders who had acceded to this agreement, transferred his shares to K., a nominee of S., by a deed in the common form, reciting a contract for sale by W. to K., and acknowledging the purchase-money to have been paid. K. took this transfer at the request of and as a trustee for S., and on the faith of the acknowledgment in the deed and the assurance of S. that the purchase-money had been paid. The money was never in fact paid. *Held*, that W. was entitled to recover it from K. by suit in equity.¹

THIS was an appeal by the defendant from a decree of the Master of the Rolls, ordering him to pay the purchase-money of certain shares which had been transferred to him in the Newcastle Commercial Banking Company.

In 1855 the plaintiff was a shareholder in the bank. Some time previously John Sadleir had formed a scheme for buying up

¹ In *Wilkinson v. Scott*, 17 Mass. 249, it was held that an action at law lies for the grantor of land against the grantee for a part of the consideration acknowledged in the deed to have been paid, but which the defendant by mistake failed in fact to secure or pay. PARKER C. J. p. 257, said: "A receipt is always open to explanation; and this acknowledgment, although under seal, is nothing more than a receipt, for the seal gives it no additional solemnity." See also *Nutting v. Dickinson*, 8 Allen, 540; *Basford v. Reardon*, 9 Allen, 387; *Wetherbe v. Potter*, 99 Mass. 362; *Bowen v. Bell*, 20 Johns. 338; *M'Crea v. Purmont*, 16 Wend. 460; *Morse v. Shattuck*, 4 N. H. 229; *Pritchard v. Brown*, 4 N. H. 397; *Buffum v. Green*, 82; *Belden v. Seymour*, 8 Conn. 304; *Skillinger v. M'Cann*, 6 Greenl. 364, and other cases cited; 1 Sugden V. & P. (8th Am. ed.) 126, note (y); 2 *ib.* 645, note (b), and cases there cited.

and consolidating a number of small joint-stock banks, and among others the Newcastle Commercial Bank, and in October, 1855, an agreement was entered into between William Walker the then managing director of the bank, and James Sadleir, F. J. Law, and R. H. Kennedy, who acted on behalf of John Sadleir, by which Walker undertook to procure to the parties of the second part, or their nominees, the transfer of at least 4000 shares in the bank, and also that the then directors would do such acts as might be requisite for vesting the management of the company in the parties of the second part, and would vacate their offices. The parties of the second part agreed that they would procure all such acts to be done as might be requisite for the due completion and registration of the transfers, and pay to the several vendors the sum of 5*l.* per share within twelve months after the dates of the respective transfers, with interest at 5*l.* per cent.

* 589 This agreement was adopted at * a general meeting of shareholders on the 3d of November. On the 5th of November a supplementary agreement was made between the same parties, to the effect that, till the purchase-moneys for the shares were paid, Walker should hold the certificates on behalf of the vendors.

The plaintiff brought in to Walker the certificates of 105 shares which he held, that the shares might be disposed of as above. By the direction of the parties to the agreement of the second part the defendant Keating was named as transferee, and the plaintiff executed a deed of transfer to him, which recited in the usual way a contract for the sale of the 105 shares by the plaintiff to the defendant for 525*l.*, and contained in the witnessing part the usual acknowledgment of the payment of the consideration. The purchase-money was not in fact paid. The deed was executed by the defendant and registered. The transfer of the business and assets of the bank was carried out, and the defendant was chosen a director. John Sadleir died in February, 1856, and in August, 1856, the bank stopped payment. The plaintiff now filed his bill to obtain payment of the purchase-money.

The defendant by his answer deposed as follows: —

“Some time in the month of November, 1855, but when precisely I cannot recollect, the said John Sadleir told me that he

had made arrangements for purchasing the Newcastle Banking Company, and that he had put some of the shares in my name. I told him that I could not take them, as I had no money to pay for them; upon which he replied, that was not what he meant, but I was to act as trustee for him, and that I should incur no responsibility in so doing; the shares were already paid for; and he produced to me one or two deeds of transfer, I *forget which, and showed me the recital therein that *590 the purchase-money for the shares had been paid, which I read; and he asked me to sign the said deed or deeds, which I did, on the faith of the recital that the shares were paid for; but when I signed the said deed or deeds, as the case may have been, I had no idea of taking any beneficial interest under the deed or deeds, and I have never claimed any such beneficial interest, and I considered that the shares transferred to me were to be held by me merely as trustee for the said John Sadleir, and that I should incur no responsibility in respect of them. The said John Sadleir, at the same time I executed the said deed or deeds, as the case may have been, also informed me that I had been appointed a director of the company, and that he wished me to accept the office. Immediately after I had signed the said deed or deeds the said John Sadleir took it or them away with him, and I have never seen it or them since. I was first cousin to the said John Sadleir, and was intimately acquainted with him, and had a great personal regard for him, and the fullest reliance on his word and in his integrity, and I was not undeceived in my opinion of him until after his death, which occurred on the 17th of February, 1856, by his own hand, and under circumstances which have become notorious and which it is unnecessary for me to repeat. The said Newcastle Banking Company stopped payment on the 26th of August, 1856. Except as regards the fact of my having signed the deed or deeds of transfer, the circumstances under which I signed them, and the representations made to me by the said John Sadleir as aforesaid, I was wholly ignorant of all the facts and circumstances hereinbefore stated until some time after the death of the said John Sadleir, and some of the said facts and circumstances I have only discovered since the filing of the plaintiff's bill; and the first time that I heard of there being any agreement for the purchase of *shares *591 in the Newcastle Bank between the said John Sadleir,

Farmery John Law, and Richard Hartley Kennedy, was some time after the death of the said John Sadleir, when Mr. O'Shea, the manager of the Newcastle Bank, told me that they had agreed to purchase the said shares, and that they were to give 5*l.* a share for them, and that they were to be allowed a year to pay for them. I never gave any authority, directly or indirectly, to the said James Sadleir, Farmery John Law, and the said Richard Hartley Kennedy, or any or either of them, to purchase or negotiate on my behalf for the purchase of any shares in the said Newcastle Company with any shareholder in the said company."

The Master of the Rolls made a decree in the plaintiff's favour, (a) from which the defendant appealed.

Mr. Roundell Palmer and *Mr. A. G. Marten*, for the plaintiff, in support of the decree.—The defendant executed a deed creating the relation of vendor and purchaser between the plaintiff and himself, and which, therefore, imposed upon him the liability to see that the purchase-money was paid. He knew that he had not paid it, and the statement of John Sadleir that it had been paid could not discharge him from his liability. The case is not the same as if the defendant were a transferee for value from a person who had, without paying his purchase-money, got a complete transfer; in that case the defendant might have been safe as a purchaser for value without notice. No doubt the defendant was cheated by Sadleir, but that does not affect the plaintiff, who was not in any way connected with Sadleir. Sadleir, by false representations, induced the defendant to become a purchaser, the contract was * completed, the parties cannot be placed *in statu quo*, and Sadleir's fraud is a matter between the defendant and him.

Mr. Selwyn and *Mr. H. Stevens*, for the defendant.—There was no contract for purchase between the plaintiff and defendant, and all the defendant ever agreed with any one to do was to take shares, the purchase-money on which had been paid. The plaintiff by handing over to Sadleir a deed acknowledging the payment of the purchase-money, enabled Sadleir to commit the

(a) 27 Beav. 121.

fraud and cannot take the benefit of it. *Rice v. Rice*, (a) *Hiorns v. Holtom*. (b) It is true that there was not such a receipt as in *Rice v. Rice*, but that is immaterial, as a receipt is never indorsed on deeds of transfer of shares which are registered by a company.

THE LORD CHANCELLOR. — I am of opinion that the decree ought to be affirmed. It is clear that the execution of the deed of transfer by the plaintiff and defendant constituted between them the relation of vendor and purchaser, and it is the duty of a purchaser to pay the purchase-money. The purchaser's defence is, "I was deceived. I was told by the person who induced me to execute the deed, that the purchase-money had been paid, and by the deed itself the plaintiff acknowledged that it had been paid." I have no doubt that the defendant was deceived by Sadleir, but that does not necessarily affect the plaintiff, as Sadleir was in no respect the plaintiff's agent. The defendant knew that he himself had not paid the money, and Sadleir's statement, that it had been paid, did not absolve him from the obligation of seeing whether it had * in fact been paid. Having * 593 by the deed placed himself in the position of purchaser, and having had no sufficient reason to suppose that the purchase-money had been paid, he is liable to be sued in equity for it, the right to sue at law having been taken away by the acknowledgment under seal.¹ The decree is, in my judgment, right, and the appeal must be dismissed.

The Lords Justices concurred.

(a) 2 Drew. 73.

(b) 16 Beav. 259.

¹ See ante, 588, note (1); 2 Sugden V. & P. (8th Am. ed.) 645, note (b), and cases cited.

SHEFFIELD v. KENNETT.

1859. July 18. Before the LORDS JUSTICES.

A fund was bequeathed to the testator's daughter for life, and if she should leave any child or children, to be divided among such children, whose interests were to be vested at twenty-one, with a direction to apply the interest of the fund towards the maintenance of the daughter's children, and a power for the trustees, with the daughter's consent, during her life, to make advancements to her children not exceeding their respective presumptive shares, with a gift over if no child attained twenty-one. *Held*, that a child who attained twenty-one, and died in the daughter's lifetime, took no share.¹

THIS was an appeal from a decision of the Master of the Rolls on a petition, the question being as to the construction of the will of Dr. Kennett, who bequeathed 4000*l.* to his daughter Sarah Ann for life, and from and immediately after her decease, if she should leave any child or children, upon trust to divide the sum of 4000*l.* equally amongst all such children, to be payable and become vested interest in such children respectively at their respective ages of twenty-one years, and in case there should be only one such child who should live to attain the age of twenty-one years, then to pay the sum of 4000*l.* unto such only child upon his or her arriving at that age, and until the child or

* 594 children of his daughter * should arrive at that age, he directed his trustees to apply the interest of the 4000*l.* towards the maintenance and education of all the children of his said daughter equally; and in case there should be only one child of his said daughter, then towards the maintenance and education of such only child. And the testator thereby empowered his trustees, with the consent of his daughter Sarah Ann during her life, to apply any part of the 4000*l.* towards the advancement in the world of any son, or for a marriage portion of any daughter, of his said daughter, not exceeding for any such child or children the presumptive share to which he, she, or they might be entitled at the time of such advancement; and in case his said daughter Sarah Ann should have no child or children who should arrive at the age of twenty-one years, then upon such trust as his

¹ See *Williams v. Haythorne*, L. R. 6 Ch. Ap. 782.

daughter should appoint by will, and in default of appointment, for her executors and administrators.

The testator's daughter had six children who attained twenty-one, and she died in 1858.

One of her children, Margaretta Fuller, attained twenty-one, married, and died in 1852, in the lifetime of her mother.

The Master of the Rolls held, that she took no interest. The case is reported in the 27th volume of Mr. Beavan's Reports. (a)

Mr. W. D. Lewis and *Mr. C. M. Roupell*, for the appellants, who claimed under her marriage settlement.

* They referred to *Powis v. Burdett*, (b) *Walker v. Simpson*, (c) *Maitland v. Chalie*, (d) *Kennedy v. Sedgwick*. (e)

Mr. W. M. James and *Mr. Pownell*, for the respondents.

They referred to *Bythesea v. Bythesea*, (g) *Tucker v. Harris*. (h)

Mr. Beck, for another respondent.

Mr. W. D. Lewis, in reply.

Their Lordships agreed with the Master of the Rolls, and dismissed the appeal.

(a) Page 207.

(b) 9 Ves. 428.

(c) 1 K. & J. 713.

(d) 6 Madd. 243.

(e) 3 K. & J. 540.

(g) 23 L. J., Ch. 1004.

(h) 5 Sim. 538.

* 596 * MAYOR, &c., OF CARDIFF v. CARDIFF WATER-
WORKS COMPANY.

1859. June 9, 10. July 21. Before the LORDS JUSTICES.

Where equitable relief by way of injunction is sought in aid of a legal right, the Court, unless such right is clear, will not, except with the consent of both parties, declare the legal right and grant a perpetual injunction founded on such declaration, but will require the question to be tried at law. In a case where the defendants claimed a right under an Act of Parliament to do the acts sought by the bill to be restrained, a perpetual injunction was granted by one of the Vice-Chancellors. *Held*, on appeal, that it not being clear upon the construction of the Act of Parliament that it did not authorize what the defendants proposed to do, they were entitled to the opinion of a Court of Common Law upon the question.¹

THIS was an appeal by the defendants from a decree of Vice-Chancellor Wood, declaring that, according to the true construction of their Act, the limit of the "port of Cardiff" did not extend beyond any parish or place within or adjoining to the town of Cardiff, and granting a perpetual injunction to restrain the defendants from laying down under the streets of Cardiff pipes for the purpose of supplying with water any parish or place not being part of the town and port of Cardiff, and from using the present pipes for that purpose. The question, whether the defendants were authorized to do the acts complained of turned on the construction of the Acts 13 & 14 Vict. c. 69, and 16 & 17 Vict. c. 24, the plaintiffs contending that the word "port" was there used in its ordinary and popular sense; the defendants, that it included every thing within the limits of the port as defined by the Lords of the Treasury under their powers of settling the limits of the different ports in the country for custom-house purposes. As their Lordships gave no opinion on the question of construction, it is not necessary to state any further particulars.

Mr. Giffard and *Mr. Kekewich* appeared in support of the decree.

¹ See Kerr Inj. 209; 2 Dan. Ch. Pr. (4th Am. ed.) 1640, 1641, and cases cited in notes; *Eaden v. Firth*, 1 H. & M. 573.

Mr. Willcock and Mr. Hobhouse, for the appeal.

Judgment reserved.

July 21.

* THE LORD JUSTICE KNIGHT BRUCE. — In this case the * 597 plaintiffs, the corporation of Cardiff, who are the local board of health there, complain of acts done by the defendants, the Cardiff Waterworks Company, in excess, as the plaintiffs say, of the powers conferred on the defendants by their Acts of Parliament passed in the years 1850 and 1853, or by the latter, which, for certain purposes at least, repealed the former. The alleged excess is denied by the defendants, against whom the plaintiffs have obtained a decision from one of the learned Vice-Chancellors, the decree now under rehearing. The question of excess depends mainly, if not altogether, upon the true construction of the 5th section of the Act of 1853, in interpreting or attempting to interpret which the Act of 1850 cannot probably be disregarded. This point seems to me not free from difficulty, and is of such a kind, that, the circumstances of the dispute being as they are, I think the defendants entitled to the opinion of a Court of Law upon it. If, therefore, the plaintiffs desire to retain their bill, they must, I conceive, bring an action, or institute, or procure the institution of some legal proceeding against the defendants on the subject. As to the nature of that action or proceeding, and the admissions, if any, fit to be required to be made in it, we shall both, I believe, be glad of the assistance of the learned counsel who so well argued the cause. But with regard to the injunction, what is to be done? Among the able observations made at the bar by the plaintiff's counsel were remarks as to the danger or risk of the acquisition by the defendants through time and user of a right to an easement or easements. But neither in this nor in any other respect, as I conceive, is there any probability of substantial damage being done or caused by the defendants to the plaintiffs, or to those whose interests the plaintiffs represent, in the interval * between * 598 the present time and the determination of the action or legal proceeding to which I have referred. If we shall discharge the decree, we ought, I think, to do so expressly without prejudice to any question, and to give the directions to which I

have referred for the purpose of obtaining a determination in a Court of Law. The bill will then be retained, with liberty to each side to apply, until which, if any grave damage or mischief to the plaintiffs shall arise or be apprehended from any conduct on the part of the defendants before the dispute shall have been concluded, the plaintiffs may come hither for the interposition of the Court.

It has occurred to my learned brother, that possibly, instead of any proceeding not in the Court of Chancery, both parties may wish to have the law of the case determined here. In that event it may perhaps be as well, and we of course have not the least objection, that they should apply to the Lord Chancellor and ask him that the cause may be argued before the full Court by one counsel of a side. With a view to this course we can for the present, if it shall seem desirable, withhold any decision.

THE LORD JUSTICE TURNER. — This is an appeal from a decree of the Vice-Chancellor Sir WILLIAM PAGE WOOD, by which his Honor has declared his opinion upon the construction of an Act of Parliament and has granted a perpetual injunction in conformity with that declaration. The case is one in which the plaintiffs sue for equitable relief, by way of injunction, in aid of a legal right vested in them, and in which the defendants dispute the plaintiffs' title to the equitable relief, upon the ground of a legal right to do the acts complained of and enjoined against, * 599 which they insist is * conferred upon them by the Act of Parliament. In such cases I think that, unless the legal rights on the one side and on the other are clear and free from reasonable doubt, this Court ought not, except with the consent of both parties, to go the length of at once declaring the legal right and granting a perpetual injunction founded upon that declaration. Either party is, I think, in such cases, entitled to insist that the questions on which the legal rights depend should be tried at law before this Court pronounces its final adjudication upon them and binds them for ever. I have read these papers, and of course have not done so without having formed some opinion upon the points in dispute, but I certainly cannot go the length of saying that the questions are free from reasonable doubt. I think, therefore, that unless both parties expressly desire to have the case now finally determined by us, it ought in

strictness to be put in the course of trial at law. It does not appear to me, however, that the facts are much, if at all, in dispute between the parties, and perhaps, therefore, it would be equally satisfactory to them that the case should be argued by one counsel on each side and disposed of in the full Court. I should be willing to agree to that course, but unless the parties either desire that we should now finally dispose of the case, or agree upon the course which I have pointed out, I think the case must be put in the course of trial at law.¹

* THOMPSON v. WEBSTER.

* 600

1859. July 21. Before the LORDS JUSTICES.

The mother of a man in embarrassed circumstances agreed to advance him 190*l.*, upon condition that he should give her a mortgage upon a small estate to which he was entitled for that sum and some moneys, amounting to 210*l.*, which she had spent in paying off some prior incumbrances, and should settle the equity of redemption upon himself and his children. This transaction was completed by two deeds, by one of which the settlor mortgaged the estate to his mother to secure 400*l.*, and by the other, in consideration of natural love and affection, settled the estate on himself and children, neither deed containing any reference to a bargain between the mother and son for the settlement. The mortgaged property was an ample security for the 400*l.* The Court was satisfied on the evidence that the settlement was executed to induce the mother to make the advance, and that she would not have made it unless the son had agreed to make the settlement. *Held*, that the settlement was to be treated as made *bonâ fide* for value, and was not void as against creditors under 13 Eliz. c. 5.²

It was doubtful upon the evidence whether the mother had really advanced so much as 210*l.* in paying off prior incumbrances. *Held*, that the transaction appearing to be *bonâ fide*, the question how much was due on the mortgage did not affect the validity of the settlement.

The practice of framing deeds so as not to show the real nature of the transaction carried out by them is to be discouraged.

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1071, and note (1).

² See *Smith v. Cherrill*, L. R. 4 Eq. 390; 2 Dart. V. & P. (4th Eng. ed.) 822, 823; 2 Sugden V. & P. (8th Am. ed.) 706, note (1); *Bayspoole v. Collins*, L. R. 6 Ch. Ap. 228.

THIS was an appeal by the plaintiff from a decree of Vice-Chancellor KINDERSLEY, dismissing with costs a bill filed to set aside a settlement made by Joshua Coupe, as made with intent to defraud or delay creditors.

The farm comprised in the settlement was worth 70*l.* a year, and had, along with other real estate, been devised by the will of Peter Coupe, the father of the settlor, upon trust that his wife Margaret, the mother of the settlor, might receive an annuity of 25*l.*, and subject thereto upon trusts under which Joshua Coupe, in August, 1854, became entitled in fee. The property was given by the will of Peter Coupe, "charged with the payment of a sum of 210*l.* or thereabouts and interest under the will of the late Arthur Clegg, from whose legatees I bought the same subject to the said charge." This sum the defendants stated that Mrs. Coupe had paid off.

In December, 1855, Joshua Coupe, being pressed for
* 601 * payment of 90*l.*, for which a judgment had been obtained against him, applied to his mother to lend him a sum sufficient to pay the debt and costs, amounting in all to about 100*l.* This application was made through the defendant Thomas Webster, who deposed that on the occasion of this application Mrs. Coupe learnt from him that this farm, which she supposed to have been devised in settlement by her husband's will, belonged to Joshua Coupe absolutely, that she expressed herself desirous of keeping the farm in the family, and said she would make the advance if Joshua Coupe would give her a mortgage on the farm for the 100*l.* and for the sums which she had already advanced to pay off the 210*l.* charge, and would settle the equity of redemption. This offer Mr. Webster stated was communicated to Joshua Coupe, who agreed to execute the mortgage and settlement if his mother would make the advance 190*l.* instead of 100*l.* The mother agreed to this, and the transaction was completed by two deeds dated the 5th of January, 1856.

By the first of these deeds, reciting the will of Peter Coupe and the title of Joshua Coupe, and mentioning that the 210*l.* was not in fact a charge under the will of A. Clegg but a portion of the purchase-money remaining unpaid, and that Margaret Coupe had paid off out of her own moneys this sum, and all interest for the same, and had agreed to lend Joshua Coupe the further sum of 190*l.* on having the repayment of both sums with interest

secured in manner therein appearing, Joshua Coupe mortgaged the farm to Margaret Coupe in fee to secure the 210*l.* and 190*l.*, making together 400*l.*

The second deed was an indenture of settlement, made between Joshua Coupe of the one part, and Mary Antrobus and Thomas Webster of the other part, by which, after reciting the title of Joshua Coupe under the will of * Peter Coupe, * 602 and reciting that Margaret Coupe had paid off the 210*l.*, and reciting the mortgage of even date, and reciting that Joshua Coupe, in consideration of his natural love and affection for his children, and for divers other good considerations, was desirous of settling the farm in the manner thereafter appearing, Joshua Coupe, "for effectuating his said desire and in consideration of the natural love and affection of the said Joshua Coupe for his said children, and for divers other good considerations," conveyed the farm to Mary Antrobus and Webster in fee, upon trust to sell to invest the proceeds, and to stand possessed of the fund upon trust for Joshua Coupe for his life, and after his death upon trust for such of his children as should attain twenty-one or die under that age leaving issue, and in default of such children in trust for him. Neither deed contained the slightest indication of there having been any bargain between the settlor and his mother that the farm should be settled.

The settlor was undoubtedly embarrassed at the time of the settlement, though it did not clearly appear that his property, exclusive of the farm, was insufficient to pay his debts. The Court considered it established by the evidence that the 190*l.* was actually advanced by the mother to the son or paid to his creditors by his direction, but there was some uncertainty as to the nature and extent of the prior claims which the mother had satisfied.

In July, 1857, Coupe was arrested on a *ca. sa.* issued on a judgment obtained against him by Thompson in an action upon a promissory note for 300*l.*, which he had given to Thompson on the 23d of November, 1855. Coupe, in August, 1857, took the benefit of the Act for * the Relief of Insolvent * 603 Debtors, and Thompson was appointed the assignee of his estate.

Mrs. Coupe died in the settlor's lifetime, leaving a will, by which she appointed Thomas Webster, Andrew Ransome, and John Ludlow her executors, and devised to them all estates

vested in her as a mortgagee. Joshua Coupe died in January, 1858, leaving two infant daughters.

This bill was filed against the trustees of the settlement, Mrs. Coupe's executors and the infant children of the settlor, to set aside the settlement.

Vice-Chancellor KINDERSLEY dismissed the bill with costs, (a) and the plaintiff appealed.

Mr. Anderson and Mr. G. W. Collins, for the plaintiff. — The Vice-Chancellor thought that the settlement was voluntary, and was not satisfied that its effect was not to defeat creditors, but he was of opinion that an intention to delay creditors must be shown, and that the settlement here was not made with that object and was therefore valid. We submit that this is not a correct view of the law. We contend that the Court has nothing to do with the settlor's actual motive, but that he must be presumed to intend whatever is the necessary consequence of his act. Indebtedness and want of consideration are all that are necessary to raise the presumption of intent to defeat creditors. *Re Magawley's Trust.* (b) The settlement, trying it by this rule, is clearly void under the 2d section of 13 Eliz. c. 5, unless * 604 saved by the 6th section. * To bring it within the latter sections there must be a substantial consideration, one not wholly inadequate. *Matthews v. Feaver*, (c) *Penhall v. Elwin*. (d) Here the consideration was utterly inadequate. The 400*l.* might have been easily raised from a stranger on this security, and the lending it was no substantial consideration for a settlement. The mother, though not aware of the plaintiff's debt, was aware of her son's embarrassed circumstances. The 210*l.* was not advanced by Mrs. Coupe, which affects the *bona fides* of the whole transaction. In this state of things the settlement cannot be sustained; absolute insolvency is not necessary to invalidate it. *French v. French*, (e) *Clements v. Eccles*. (g) [*Russell v. Hammond* (h) was also referred to.]

Sir H. M. Cairns, Mr. Bazalgette and Mr. Charles Hall, for

(a) 4 Drew. 628.

(b) 5 De G. & Sm. 1.

(c) 1 Cox, 278.

(d) 1 Sm. & G. 258.

(e) 6 De G., M. & G. 95.

(g) 11 Ir. Eq. Rep. 229.

(h) 1 Atk. 18.

the defendants. — It is perfectly clear on the evidence that the mother refused to advance this money unless a settlement was made, and that the settlement was *bonâ fide* made in order to induce her to advance it, not with any view to making the property more difficult for creditors to reach. There may be a question whether this security was so eligible that a stranger could have readily been found to advance money on it. But it is of no importance whether that be so or not, the Court will not measure the amount of consideration; the only question is, whether the settlement really resulted from a bargain between the mother and son, and was executed because she would not advance the money or other terms.

Holmes v. Penny (a) was referred to.

Mr. Anderson, in reply.

* THE LORD JUSTICE KNIGHT BRUCE. — Subject to the * 605 question of the amount due on the mortgage, I should have thought this a plain case for supporting the transaction. It is impossible, on the evidence, not to believe that the mother wished to retain in the family a small landed estate which she had erroneously believed to have been already settled. The son was an imprudent man, somewhat addicted to drink, inclined to extravagance and disposed to suretyship. He repeatedly obtained money from his mother before making a final, or nearly final, demand for a loan of 100l. The mother agreed to advance the money on condition that the estate should be brought into settlement. This was communicated to the son by another person, the lady being bedridden. The son said he would settle the estate, provided that a sum were added to the advance and a life-estate were reserved to him, his mother, from kind motives no doubt, having wished that he should not retain a life-estate. The mother assented, and the transaction was completed by two contemporaneous deeds, — a mortgage and a settlement, unfortunately not showing on the face of them that there was any connection between them. It would have been better if the true nature of the transaction had appeared at least in one of them. So far the case is clearly one of a settlement made *bonâ fide* for

(a) 8 K. & J. 90.

value, not within the statute, not impeachable at common law. But the validity of the debt of 400*l.* has been plausibly disputed. As to the money stated to have been advanced at the time, I take the result of the evidence to be, that there is sufficient proof of its having been advanced, though there may be some slight defect in the evidence as to part of the amount. But the mort-

gage was in part for a sum due, or alleged to have become
 * 606 due, previously in respect * of the purchase-money payable to a former owner of the property, and some documents have been produced which throw a doubt upon the question whether so much really was due. I do not, however, think that there was any fraud; I doubt whether there was even any mistake; and it is not in my judgment, a legitimate inference from the evidence that the son was ignorant of the amount due to the former owner of the estate. The family do not appear to have had transactions on a large scale, and the impression that I have is, that whatever the facts were they were known to the son. In these circumstances the question as to the amount due on the mortgage cannot, as I conceive, affect the validity of the settlement.

With regard to the title of the plaintiff, notwithstanding the validity of the settlement, it may be proper to provide for it, as both the children may die minors and unmarried. The undertaking which the trustees have given to redeem the mortgage may be embodied in our order, and it may be right also to declare that the dismissal is to be without prejudice to any question as to the amount really due on the mortgage.

The circumstances of the case, are, however, in some respects so singular, the settlement and mortgage are so nearly of the same date with the promissory note to Mr. Thompson, and there is such a total silence in each of them as to the true nature of the transaction, the embarrassments of the son were so certain, and his means of meeting them so far from clear, that I feel disposed, with deference to the Vice-Chancellor, to relieve the plaintiff from the costs before the Vice-Chancellor, and to give the respondents no costs here beyond the amount of the deposit.

* 607 * THE LORD JUSTICE TURNER. — I am of opinion that this settlement was for valuable consideration. It is evident that no part of the sum advanced by the mother to the son would

have been advanced if he had not made this settlement, and I do not think that the validity of the settlement can be at all affected by the question what amount is due on the mortgage, for I do not think that the fact of less than the apparent amount being due impeaches the *bona fides* of the transaction. I agree, however, with my learned brother, that the bill should have been dismissed without and not with costs, for I think that transactions of this description justify inquiry. I am the more ready to agree to the dismissal of the bill without costs, as I have observed that attempts have lately been made to manufacture considerations of this kind in order to support settlements made for the purpose of defrauding creditors, and because I hope that this decision may induce solicitors to put upon the face of deeds the true nature of the transaction, a course which is every day departed from, and has improperly been departed from in this case. I have no objection to a declaration that the decree is to be without prejudice to any question as to the amount due on the mortgage; subject to this the decree will be for dismissal of the bill without costs, the trustees undertaking to redeem the mortgage, the respondents to receive the deposit, but no further costs of the appeal.

The defendants T. Webster and M. Antrobus, the trustees of the indenture of settlement of the 5th of January, 1856, by their counsel undertaking to redeem the mortgaged premises in the pleadings mentioned, in * case they shall be required * 608 by the mortgagees to do so, their Lordships do, without prejudice to the right (if any) of the plaintiff to question the amount due on the mortgage of the 5th of January, 1856, order that the decree dated the 28th of June, 1859, be varied, and do order that the plaintiff's bill do stand dismissed out of this Court without costs.

Deposit to be paid to the defendants' solicitor.

BRIGHT v. LARCHER. (No. 2).

1859. July 25, 26. Before the LORDS JUSTICES.

A legacy was bequeathed with a direction that it should be paid as soon as conveniently might be after the testator's death, which took place in 1822. An annuity charged by the will on real estate terminated in 1856. In 1858 the legatee filed a bill, insisting that the legacy was charged on the real estate, and ought to be paid out of a fund arising from it, and set apart to answer the annuity. The bill made the trustees of this fund parties, but no personal representative of the testator. It was not proved that the personal estate was exhausted. *Held*, that, whether the real estate was charged or not with the legacy, the personal estate was primarily liable, and that the bill was too late,¹ and was defective for want of parties, and leave to amend at the hearing was refused.

THIS was the appeal of the plaintiff from the dismissal of his bill by the Master of the Rolls with costs.

The plaintiff was a legatee under the will of William Bright, which came in question in another case reported in a former volume, and a portion of which is there set out. (a)

In an earlier part of the will than the extract given in the former report, the testator bequeathed to his brother Josias * 609 Bright, who was the appellant, but who was not * a party to the former suit, the sum of 100*l.*, to be paid to him as soon as conveniently might be after the testator's decease.

The testator died in 1822, and the present bill was not filed till after the decision of their Lordships in the former suit in 1858. The defendants to the present suit were the surviving trustee of the fund arising from the proceeds of the real estate, which had been set apart to answer the annuities mentioned in the former report, and the persons entitled under the residuary gift in the will, but no personal representative of the testator was made a party. The bill alleged that the personal estate was exhausted in payment of debts, and prayed a declaration that the legacy was payable out of the fund set apart to answer the annuities, and prayed payment thereof accordingly out of the fund.

(a) 3 De G. & J. 148.

¹ See *Perry Trusts*, § 576; *Henderson v. Atkins*, 28 L. J. Ch. N. S. 913; *Angell Limitations* (4th ed.), § 172; *Thompson v. M'Gaw*, 2 Watts, 161; *Anderson v. Burwell*, 6 Gratt. 405.

There was no evidence of the exhaustion of the personal estate.

The Master of the Rolls held the legacy barred by the Statute of Limitations. The case is reported in the 27th volume of Mr. Beavan's Reports. (a)

Mr. Selwyn and *Mr. J. T. Humphry*, in support of the appeal. — On the question of the legacy being charged on the real estate, they referred to *Kidney v. Coussmaker*, (b) *Bench v. Biles*. (c)

On the question as to the Statute of Limitations, they referred to Sugden's Real Property Statutes, p. 126, * *Prior* * 610 v. *Horniblow*, (d) *Adams v. Barry*, (e) *Ravenscroft v. Frisby*, (g) *Burrell v. Lord Egremont*, (h) *Wheeler v. Howell*, (i) *Snow v. Booth*. (k)

On the question as to the absence of a legal personal representative of the testator, they contended that, as the legacy was charged on the real estate, and the only question was as to the applicability of a fund arising from the proceeds of real estate, the legal personal representatives of the testator need not be before the Court. If, however, the Court should think otherwise, they asked leave to amend the bill.

They also referred to *Burrell v. Lord Egremont*. (l)

Mr. Toller appeared for the trustee.

Mr. G. L. Russell, *Mr. Nalder*, and *Mr. W. H. Bagshawe*, for the other respondents.

THE LORD JUSTICE KNIGHT BRUCE. — The bill in this case, which was filed in 1858, seeks payment of a legacy of 100*l.* given by the will of a testator who died in 1822. The legacy was payable in 1822 or 1823, if there were funds to pay it. If it was payable out of the personal estate alone, of course the bill fails from lapse of time. But it is said that the legacy is charged on the testator's real estate at a postponed period; that is, that it

(a) Page 130.

(b) 1 Ves. Jr. 436; 2 Ves. Jr. 267.

(c) 4 Madd. 187.

(d) 2 Y. & C. 200.

(e) 2 Coll. 290.

(g) 1 Coll. 16.

(h) 7 Beav. 205.

(i) 3 K. & J. 198.

(k) 2 K. & J. 132.

(l) 3 Hare, 212.

is to be paid out of the proceeds of the sale of the real estates, which sale was to be deferred till the death of an annuitant, who died a few months ago. Without giving an opinion whether this is the case, I assume it to be so; still the personal estate is the primary fund in every sense, although it may not be the only fund for the payment. There is no personal representative of the testator before the Court, but there is evidence of the amount of the personal estate, from which it is impossible to come to the conclusion that the personal estate, if properly administered, is not sufficient to pay at least a part of this legacy. In such a state of circumstances the bill comes too late, even if the real estate was in any sense chargeable, because the personal estate is the first fund. In every view the suit fails.

I am not for giving the plaintiff leave to amend. The dismissal of the bill must stand, and with costs.

THE LORD JUSTICE TURNER. — The plaintiff's case rests on the assumption that all the legacies are on the same footing as the legacy of 150*l.*, and are to be paid out of the same fund. This is not my view, nor was it the view of the Court at the time of the decision in the former suit, to the best of my remembrance. The ground of the decision there was, that the legacy of 150*l.* was not payable until after the death of the annuitant, and that it was plain from the will that the whole of the fund produced by the sale of the real and personal estate, except that portion set apart to answer her annuity, was divisible before her death. On this ground the Court held that the testator intended the legacy to be payable out of the fund reserved for the annuity. But this is not the case with the other legacies, which are payable immediately out of the personal estate.

Then the question arises whether after this lapse of time, the plaintiff's having brought the suit to a hearing in an imperfect state, the Court ought to give leave to amend the bill. I do not think it ought. I never knew a case in which the plaintiff was less entitled to this indulgence. The plaintiff had notice of the objection in the answer of the defendants. The appeal must be dismissed with costs.

COLLINS v. BURTON.

1859. July 28, 29. Before the LORDS JUSTICES.

A bill was filed by a creditor, to whom an uncertificated bankrupt became indebted after his bankruptcy, on behalf of himself and all creditors subsequent to the bankruptcy, seeking to set aside a voluntary settlement made before the debt due to the plaintiff was incurred. The assignees, who were defendants, did not dispute the validity of the settlement. *Held*, that the bill could not be sustained.¹

Costs of successful appeal ordered to be paid by the respondent.²

THIS was an appeal from a decree made by Vice-Chancellor STUART, declaring a settlement void as against the plaintiff and other creditors, to whom Philip Barnes, the settlor, became indebted after his second bankruptcy.

On the 5th of December, 1829, Philip Barnes, who then carried on the business of a builder at Norwich, was declared a bankrupt, and on the 9th of March, 1830, he obtained his certificate. His debts amounted to about 1500*l.*, but no dividend was paid.

On the 25th of May, 1840, he was again declared bankrupt on the petition of his brother-in-law. On the 10th of August, 1840, his final examination was adjourned *sine die*, on the ground that his accounts were unsatisfactory, and he never obtained a certificate under the second bankruptcy.

The debts proved under the second bankruptcy were about 1000*l.*, and there were alleged to be other creditors * whose debts were provable, but who forbore to prove in * 613 consequence of there being no prospect of a dividend.

In 1841, Philip Barnes was discharged by the Court for the relief of Insolvent Debtors, on his petition to that Court, after five months' imprisonment.

By an agreement of the 31st of December, 1849, and made between her Majesty of the first part, the commissioners of woods and forests of the second part, Philip Barnes of the third part, and Patrick Francis Robertson of the fourth part, the commis-

¹ See *Reese River Silver Mining Co. v. Atwell*, L. R. 7 Eq. 347.

² 2 Dan. Ch. Pr. (4th Am. ed.) 1490; *Denny v. Hancock*, L. R. 6 Ch. Ap. 138.

sioners of woods and forests agreed to let and Philip Barnes agreed to take three pieces of ground at Hastings for ninety-nine years on building leases, according to the stipulations of the agreement.

By the settlement in question in the cause, which was dated the 12th of September, 1850, and made between Philip Barnes of the first part, Harriet Ann Barnes and Elizabeth Sedley Barnes of the second part, and Philip Edward Barnes and Robert Mace of the third part, in consideration of the natural love and affection which Philip Barnes bore to Harriet Ann Barnes and Elizabeth Sedley Barnes, his daughters, and Philip Edward Barnes, Robert Barnes, and John Henry Barnes, his sons, Philip Barnes assigned unto Philip Edward Barnes and Robert Mace, their executors, administrators and assigns, the piece of ground comprised in the building agreement, and he appointed Philip Edward Barnes and Robert Mace, and the survivor of them, and the executors and administrators of such survivor, their or his nominees and nominee and assigns, or the party or parties to take a grant of leases according to the agreement. And it was thereby agreed and

declared that Philip Edward Barnes and Robert Mace,
* 614 their * executors, administrators, and assigns, should stand possessed of the premises thereinbefore assigned in the mean time, and until such leases as aforesaid should have been granted, and also after such leases should have been granted, upon trusts therein declared, being trusts in favour of Harriet Ann Barnes, Elizabeth Sedley Barnes, and their respective children, and Philip Edward Barnes, Robert Barnes, and John Henry Barnes.

Shortly after the date of the settlement the commissioners of woods and forests granted leases to the trustees of the settlement. Harriet Ann Barnes married in 1851, and Elizabeth Sedley Barnes in 1852, and it was alleged that their marriages took place on the faith of the validity of the voluntary settlement.

Philip Barnes, after his second bankruptcy, continued to carry on building speculations, and became indebted to various persons. The plaintiff received in the way of his trade an acceptance of Philip Barnes for 60*l.*, which, on becoming due on the 28th of May, 1854, was dishonoured.

The plaintiff filed the bill in the present suit on behalf of himself and the other creditors of Philip Barnes, whose debts had been incurred since the date of his second bankruptcy, against

the persons interested under the voluntary settlement and the assignees under the second bankruptcy, stating that Robert Mace and the other defendants interested under the trusts of the settlement were well acquainted with the facts of the second bankruptcy of Philip Barnes, that he was at the date of the settlement utterly and hopelessly insolvent, and that his interest under the agreement was the whole or nearly the whole of the property to which he was entitled at the date of the settlement, and charging that the plaintiff and the other subsequent creditors of * Philip Barnes were entitled to be paid their debts out of * 615 the property which he had acquired subsequently to the second bankruptcy, in priority over the debts owing to the creditors who proved or might have proved under such bankruptcy, and that the plaintiff was entitled to have the subsequently-acquired property administered in this Court for that purpose, and prayed a declaration accordingly and consequential relief.

The Vice-Chancellor made a decree substantially according to the prayer of the bill, and some of the persons beneficially interested under the settlement appealed.

Mr. Bacon and Mr. Jolliffe, for the plaintiff, in support of the decree. — *Tucker v. Hernaman*, (a) is decisive of the case. According to that authority the creditors who became so after the second bankruptcy have a claim paramount to the assignees under that bankruptcy. Nor do those assignees indeed claim any interest, being satisfied of the superior equity of the subsequent creditors. The equity is, according to *Tucker v. Hernaman*, (a) to be administered in this Court and not in the Court of Bankruptcy. The claim under the voluntary settlement could not prevail even against the assignees under the second bankruptcy, and as the subsequent creditors have a preference over those assignees, they must necessarily be preferred to the appellants.

Mr. Osborne, in support of the appeal. — The plaintiff cannot complain of the settlement, which was executed before the bankrupt became indebted to * him, nor can a creditor * 616 merely as such of a living person impeach a deed except under an execution or some process entitling him to take the

(a) 4 De G., M. & G. 395.

property comprised in the deed. There is not and could not be any such process here at the suit of the plaintiff.

Mr. Malins and Mr. Southgate, for the assignees.

The following cases were referred to: *Kirk v. Clark*, (a) *East India Company v. Clavel*, (b) *Brown v. Carter*, (c) *George v. Milbanke*, (d) *Daubeny v. Cockburn*, (e) *Richardson v. Smallwood*, (g) *Jones v. Powles*, (h) *Maunsell v. White*, (i) *Holmes v. Penney*, (k) *Payne v. Mortimer*. (l)

Mr. Jolliffe, in reply.

THE LORD JUSTICE KNIGHT BRUCE. — It has been very properly conceded, that if there had not been any bankruptcy, or any proceedings in the Insolvent Court against Philip Barnes, the present bill could not have been sustained, because it is that of a simple contract creditor of Barnes on behalf of himself and other simple contract creditors, and does not allege that the plaintiff has obtained any judgment, decree, or order, or that he is in the course of obtaining any.¹ The question is, whether the second bankruptcy (for we need only look to that) makes any difference. The * 617 bankrupt is uncertificated under it and incurred * debts afterwards, and amongst the debts so incurred was the debt of the present plaintiff. He suggests that the assignees under the second bankruptcy owe him a duty, namely, the duty of pursuing the settled property, of which it is the object of this suit to defeat the settlement for the purpose of enabling payment to be made to him. Now, I do not think, that any such duty exists.

(a) *Prec. in Ch.* 275.

(g) *Jac.* 552.

(b) *Prec. in Ch.* 377.

(h) 3 *M. & K.* 581.

(c) 5 *Ves.* 862.

(i) 4 *H. L. Cas.* 1039.

(d) 9 *Ves.* 190.

(k) 3 *K. & J.* 90.

(e) 1 *Meriv.* 626.

(l) *Ante*, p. 447.

¹ See *Reese River Mining Co. v. Atwell*, L. R. 7 Eq. 350. The Master of the Rolls, referring to the suggestion in the text, said: "The Lord Justice does not say that a judgment is necessary; all that he says is, that the plaintiff should be in the course of obtaining one. In truth, the plaintiff must show that he is a creditor; that is the essential thing, and the judgment would be proof of that."

In the first place, the property so circumstanced is of such a particular description that the assignees are not bound to take it. They are entitled to reject it. But, moreover, the case made by the bill is one of a title to have this property applied to the payment of creditors, of whom the plaintiff is one, adversely to the assignees in the sense of the creditors' claims being paramount to theirs. I cannot conceive, therefore, that upon the statements of this bill the assignees owe to this plaintiff any duty whatever, or at all events any such duty as would enable the plaintiff, by reason of its non-performance, to associate with them as co-defendants those who claim under the impeached settlement as joining in effect and substance in a breach of trust.

With regard to the substantial merits of the case, the bankrupt incurred a simple contract debt whilst he was uncertificated. Two or three years before he had done so, though after the bankruptcy, he settled the property in question. *Primâ facie*, a creditor whose debt originated after the settlement can have no right to complain of it, even independently of the difficulty in the way of a general creditor of a living man seeking to make his property available without having obtained a judgment, decree, or order.

There may be special and particular circumstances which may enable a creditor to complain of an act done * before * 618 his debt accrued, but there are no such special or particular circumstances here, and I am at a loss to see any ground, direct or indirect, primary or secondary, on which the present plaintiff is entitled to sue those who claim under the settlement upon the allegations of this bill, even assuming for the purpose of the argument the truth of every one of them.

Whether he has a right to sue the assignees is in truth an immaterial question, of which we need not dispose, because the assignees are friendly to him and co-operate with him, and there is no dispute between them.

THE LORD JUSTICE TURNER. — I am of the same opinion. The plaintiff sues on behalf of himself and all the other creditors who became such subsequent to the second bankruptcy, and, not founding his claim on any judgment or decree that he has recovered or obtained, he claims adversely to the assignees and seeks to impeach the title of persons who also claim a title adverse to

the assignees. I have never heard of such a bill being sustained. It is attempted to maintain it on the ground that the assignees are trustees for the subsequent creditors, and that the trustees of the settlement are trustees for the assignees. Both those positions fail. Till this Court has made a decree declaring the priority of the subsequent creditors over the creditors under the bankruptcy, the assignees are not trustees for the subsequent creditors. Nor are the trustees of the settlement trustees for the assignees until the Court has set aside the settlement.

Their Lordships dismissed the bill; and after a discussion as to costs, in the course of which their Lordships observed * 619 that, according to modern practice, there * was no rule against giving a successful appellant all his costs, and that the present practice of the Privy Council was in favour of giving such costs, their Lordships ordered that the plaintiff should pay the appellants' costs, both below and upon the appeal.

KNIGHT v. BOWYER.

1859. June 29, 30. August 1. Before the LORDS JUSTICES.

In March, 1814, G. B. granted life annuities of 500*l.*, 460*l.*, and 383*l.* to A. D., in consideration of sums of 3000*l.*, 2760*l.*, and 1998*l.*, and as a collateral security gave judgments for double those sums. In June, 1814, G. B. granted six annuities to six other persons, and appointed a receiver of the rents of his real estate for securing them. The receiver took possession. A. D. issued elegits on his judgments, and extended one half of the estate under the first, and the other half under the second, but there was a return of *nil* upon the third. He did not take possession of the estate, but an agreement was, in 1817, entered into between him and the six annuitants, that he should allow the receiver to continue in possession, and should be paid out of the rents 385*l.* a year, being interest at 5*l.* per cent. on what he had paid for the annuities. In 1819 A. D. purchased part of the estate, and so extinguished his first two judgments. He continued to receive the 385*l.* a year till 1846. A suit having been instituted by subsequent incumbrancers to enforce their charges —

Held, that, apart from the agreement of 1817, as A. D. had never taken possession, he could not be considered to have received the 385*l.* a year in respect of his third judgment, and therefore was not bound to apply what he received in satisfaction of that judgment.

Held, that, under the agreement, A. D. did not receive the 385*l.* a year in respect of his judgments, but in respect of his annuities, and that he was at liberty to apply it in discharge of the first two annuities, though the judgments for securing them had been extinguished.

Held, that a judgment given for securing an annuity, carries interest under 1 & 2 Vict. c. 110, §17.¹

THIS was an appeal from an order of the Master of the Rolls, dismissing with costs a motion on the part of the plaintiffs, to vary the chief clerk's certificate, by which he found the sum of 6208*l.* 17*s.* 7*d.* to be due to Alexander Donovan on an account directed by the decree.

The principal facts of the case will be found at length in the report of the appeal from the decree made on * the * 620 hearing (a). For the present purpose, the following statement will be sufficient.

In March, 1814, Sir George Bowyer, being then tenant for life of an estate called the Radley estate, granted three several annuities of 500*l.*, 460*l.*, and 333*l.* to the late Alexander Donovan (now represented by the defendant Alexander Donovan), for lives which, as to two of the annuities, were still subsisting at the time of the appeal. These annuities were granted in consideration of sums amounting in the whole to 7758*l.*, paid by the late Alexander Donovan to Sir George Bowyer, and were secured by the personal covenants of Sir George Bowyer, and were collaterally secured by judgments entered up against him in favour of the late Alexander Donovan, for the sums of 6020*l.*, 5520*l.*, and 3996*l.* respectively.

In the month of June, 1814, Sir George Bowyer granted six other annuities to Wilson Lomer and others, charged upon the Radley estate, and by deed appointed a receiver of the rents of the estate for better securing the payment of these annuities. By the deeds granting these six annuities, power was reserved to Sir George Bowyer to charge his interest in the estate, by way of annuity or otherwise, with such further sums as with the purchase-money of the six annuities and any sums secured by judgment would make up 20,000*l.*, these charges being to stand upon an equal footing with the six annuities.

In August and September, 1814, Sir George Bowyer granted

(a) *Supra*, vol. 2, p. 421.

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1042, 1255, and notes (4) and (5).

three other annuities charged upon the Radley estate, being the annuities to which the plaintiffs in this suit and others who * 621 became parties or *quasi* parties to * the suit were entitled; and by deed he directed the receiver appointed for securing the six annuities to pay these three annuities also. At the time, however, when these three annuities were granted, Donovan's judgments and the purchase-moneys of the six annuities exceeded the 20,000*l.*, which was to be made up by way of charge upon an equal footing with the six annuities.

The six annuities having fallen into arrear, the receiver appointed for securing them entered into possession of the estate.

In the month of February, 1817, Donovan issued elegits on the three judgments entered up by him, and one moiety of the Radley estate was extended under the judgment for 6000*l.*, and the other moiety upon the judgment for 5520*l.*, but there was a return of *nil* upon the judgment for 3996*l.*

Under these circumstances an agreement was entered into between Donovan and Wilson Lomer on behalf of himself and the rest of the six annuitants, on the 31st of March, 1817, by which, after reciting the grant of the six annuities, the appointment of Ballachy and Ralfe as receivers, and that, the annuities having fallen into arrear, Ballachy had entered into and then was in receipt of the rents, and had applied them in payment of the annuities, and reciting also the grant of Donovan's annuities, the giving warrants of attorney to enter up judgments for securing them, and that judgments had been entered up, and reciting that Donovan claimed to have a lien on and a right and interest in the estate by virtue of his said judgments, and had issued elegits for the purpose of getting into the receipt of the rents and profits of the estates, and

that differences had arisen between the six annuitants and * 622 Donovan as to the right, title, or interest of * Donovan in and to the said estates prior to and in exclusion of the six annuitants, and that in order to put an end to and determine such disputes and differences, it had been agreed between Wilson Lomer on behalf of himself and the rest of the six annuitants and Donovan, that Ballachy should be allowed to continue in the receipt of the rents of the estates, and that Donovan should be paid interest on the several capital sums advanced and paid by him to Sir George Bowyer for the purchase of the said several annuities, amounting together to the sum of 7758*l.*, after the rate

of 5*l.* per centum per annum out of the rents, it was witnessed, and Wilson Lomer on behalf of the six annuitants and Alexander Donovan thereby mutually agreed, that Ballachy should continue to receive and collect the rents of the estates as such receiver as aforesaid, and should thereout pay to Donovan, his executors, administrators, or assigns, the annual sum of 385*l.*, being after the rate of 5*l.* per cent per annum on the said principal sum of 7758*l.*, and should pay and apply the surplus of such rents and profits to the six annuitants, ratably and in proportion according to the amount of their said several annuities. And Donovan, for himself, his executors, administrators, and assigns, further agreed, that he would accept and take the said annual sum of 385*l.* in full for any claim or demand, right or interest he then had or might thereafter have on the estates by virtue of his said judgments as against the said parties or either of them; and that he would join in all necessary acts to enable Ballachy to receive the said rents and pay and distribute the same in manner aforesaid; and further that in case the surplus of the rents after deducting the 385*l.* should at any time thereafter, from any cause whatever, become insufficient to pay to the six annuitants the sum of 899*l.* per annum, being after the rate of 5*l.* per cent per annum on the amount of their respective purchase-moneys for the said annuities as aforesaid, exclusive of * the yearly premium * 623 paid by them respectively on the policies of insurance effected by them on the life of Sir George Bowyer, then and in that case and so often as the same should happen, the rents of the estates should, after payment in the first place to the six annuitants of the amount of the premiums on such assurance, be distributed ratably between the six annuitants and Donovan, according to the proportion of their respective purchase-moneys as aforesaid. And Donovan thereby further agreed that he, his heirs, executors, and administrators should and would save harmless and indemnify the six annuitants, their heirs, executors, administrators, and assigns, their agents or trustees, of, from, and against all sum and sums of money, damages, costs, charges, and expenses they, or any or either of them, or their said agents or trustees, should or might sustain, pay or be put unto by reason or on account of any sum or sums of money that should or might be paid to him, Donovan, out of the rents of the estates by virtue of that agreement or by their allowing him to participate in

manner aforesaid in the rents and profits of the estate ; and also, that in case Sir George Bowyer, his executors, administrators, or assigns, or any person on his behalf, should pay to Donovan, his executors, administrators, or assigns, the said principal sum of 7758*l.* or any part thereof, in redemption or repurchase of his three annuities, or any of them, or any part thereof, except by the felling of timber, or in case the said annuities or any or either of them should cease by the death of all or any of the persons for whose life or lives the same were granted, that then and in either of those cases the yearly sum of 385*l.* thereby agreed to be paid to Donovan should cease, or be reduced in proportion to the sum or sums of money so paid, or the said annuities or any or either of them so determining or becoming extinct.

* 624 *In the year 1819, Donovan purchased part of the estates which had been extended under the elegits on the judgments for 6000*l.* and 5520*l.* He continued to receive the 385*l.* a year under the agreement till 1846.

By the decree, dated the 15th of July, 1857, made on the hearing of the cause, it was amongst other things declared, that the three several judgments for 6000*l.*, 5520*l.*, and 3996*l.* entered up in favour of Donovan as securities for his annuities of 500*l.*, 460*l.*, and 333*l.* were well charged on the life-estate or interest of Sir George Bowyer in priority to the charge of the three annuities, but that by Donovan's purchase of part of the lands extended under the two first of such judgments, such two first judgments became extinguished. An account was directed of what was due to Donovan in respect of the judgment for 3996*l.*, and for his costs at law and in this Court, such costs to be taxed by the proper taxing master.

By a separate certificate dated the 17th of March, 1859, there was found due to Donovan in respect of his judgment for 3996*l.* the sum of 3996*l.*, with interest at 4*l.* per cent from the 4th of August, 1847, the total amount including the costs being 6208*l.* 17*s.* 7*d.*

The plaintiff moved before the Master of the Rolls to vary this certificate, contending that Donovan had no right after 1819 to apply the 385*l.* towards any thing but what was due on the third judgment, the other two having been extinguished, and that the amount of the 385*l.* a year having far exceeded what was due to him in respect of his third judgment and costs, it ought to have

been found that nothing was due to him. The Master of the Rolls refused the application with costs, and from that order the present appeal was brought.

* *Mr. Selwyn, Mr. Hislop Clarke, and Mr. Dart*, for the * 625 plaintiff. — Two of Donovan's judgments having been satisfied by the purchase of part of the lands subject to them, the annuities secured by those judgments were, we contend, gone, as far as the lands are concerned. The only annuity which remained subsisting as a charge on the land was the annuity of 333*l.*, and Donovan has received rents far exceeding that amount, and so has been overpaid. He acquired no right under the receivership deed and the trust deed, his demand for what was due on the extinguished judgments was only a personal demand on Sir George Bowyer and not upon the land. By the agreement he was to receive certain sums out of the rents, this in fact made Ballachy agent for him, he became an incumbrancer in possession, and could only apply the rents in discharge of incumbrances on the land. But even if not, he at all events received the rents specifically as rents, and they must be attributed to his subsisting charge on the land and to that only. That agreement was an arrangement by him with some only of the persons who had liens on the estate, and he could not acquire by it a right to attribute rents received under it to any demand other than a valid incumbrance on the land. *Johnson v. Bourne*, (a) *Young v. English*. (b)

If, however, the Court is against us on the above point, we contend that Donovan cannot be allowed any thing out of the rents beyond the principal sum for which judgment was given, and that this sum being double the sum advanced and as in the nature of a penalty, does not * carry interest. * 626 *Hughes v. Wynne*, (c) *Tunstall v. Trappes*. (d)

Mr. Follett and Mr. Freeling, for Donovan. — Two of Donovan's judgments have been made useless by a technical rule, which is contrary to natural justice; this Court is now asked to go further and to treat his remaining judgment as satisfied in equity while it subsists at law. This judgment was a running

(a) 2 Y. & C. C. C. 268.

(c) 1 M. & K. 20.

(b) 7 Beav. 10.

(d) 3 Sim. 299.

security, intended to continue as long as the annuity lasted, and the payments made to Donovan are to be considered as made in respect of the annuity, not in satisfaction of the judgment. *Crofts v. Wilkinson*. (a) The agreement of 1817 was not an agreement for putting Donovan into possession of the land, it was an agreement to buy him off that he might not take possession, and the scope of it was, not to deal with the judgments but to provide for keeping down the annuities. It was an arrangement of which the three annuitants had notice from the first, they became *cestui que trusts* under the receivership deed and the trust deed, and might at once have questioned this arrangement and the payments made under it; yet, though two judgments ceased in 1819, and the payments were enough to satisfy the third judgment by 1830, they went on till 1846. The plaintiffs, having acquiesced so long, cannot be heard to question the arrangement now. Under this agreement the payments having been made in respect of the annuities generally, Donovan might attribute them to those annuities in respect of which he had not any valid security. *Henniker v. Wigg*, (b) *Mills v. Fowkes*, (c) *Hodgson v. Nash*. (d)

It is contended that Donovan was in receipt of the rents * 627 and was * bound to apply them in satisfaction only of valid charges on the land. The answer is, that he never was in receipt of the rents at all; the agreement was expressly that he should not take possession. The plaintiffs would have been barred by the Statute of Limitations had he been in possession. They succeeded in their suit on the ground that the trustees were in possession. *Knight v. Bowyer*. (e) The agreement recites that Ballachy was in possession and provides for his continuing in possession. If he was in possession on behalf of Sir G. Bowyer no incumbrancers can complain of his applying the rents in satisfaction of any creditors of Sir G. Bowyer. If he was in possession on behalf of the six annuitants the remedy of the plaintiffs is to charge them with the sums which they authorized the receivers to pay to Donovan. The plaintiffs took subject to the proviso as to the 20,000*l.* Donovan's charge was part of this sum.

(a) 4 Q. B. 74.

(c) 5 Bing. N. C. 455.

(b) 4 Q. B. 792.

(d) 6 De G., M. & G. 474 [Am. ed. note (1), and cases cited; 1 Story Eq. Jur. §§ 459 b-459 h].

(e) 23 Beav. 609, 632; 2 De G. & J. 421, 440.

There is nothing in the proviso to make payments go in satisfaction of the judgments ; they would, under it, go in satisfaction of the annuities. This question was raised on the pleadings and decided. *Hele v. Lord Bexley*. (a)

We are entitled to have interest allowed on the judgment. 1 & 2 Vict. c. 110, § 17, gives interest on all judgments. The plaintiffs say that it does not apply to a judgment given for a sum double the amount advanced. There is neither authority nor principle for this. They compare the case to that of a bond, but there is no real analogy between the two cases. In the present case there was no right to have the purchase-money repaid ; the judgment was not given to secure that, but to secure payment of the annuity. *Tunstall v. Trappes* (b) has nothing to do * with the case ; a judgment at that time did not * 628 carry interest, but interest was allowed on the principal sum due, which was half the amount for which judgment had been given. *Crafts v. Wilkinson* (c) is in our favour on this point also, and so is *Godfrey v. Watson*. (d)

Mr. Selwyn, in reply. — Whatever construction be given to the agreement of 1817 it cannot bind the three annuitants who were not parties to it, and the other incumbrancers had no right to devote any part of the rents to any other purpose than paying incumbrancers. When it was made, Donovan's three judgments were a charge on the property ; two of them were afterwards satisfied — a change of circumstances which the argument on the other side ignores. As to acquiescence, there could not be any till 1819, and at that time the state of things was such that nothing could have been got by any proceeding. There cannot be any acquiescence or laches in abstaining from taking useless steps. *Crafts v. Wilkinson* (c) is irrelevant, it only decided that a judgment might be controlled even at law by a subsequent agreement. As to interest, the statute does not apply ; for it does not say that every "judgment" shall carry interest, but that every "judgment debt" shall carry interest. Here the amount of the judgment was not due, it was not a "judgment debt," there not being, as in *Godfrey v. Watson*, a present right to receive a fixed sum.

(a) 17 Beav. 14, 29; 20 Beav. 127, 131.

(c) 4 Q. B. 74.

(b) 3 Sim. 299.

(d) 8 Atk. 517.

August 1.

The Lord Justice TURNER, after stating the facts of the case, proceeded as follows:—

Three points were insisted upon on the part of the
 * 629 * appellants in support of this appeal: 1st. That independently of the agreement of 1817 the judgment was satisfied by the mere receipt by Donovan out of the rents, from 1817 to 1846, of 385*l.* per annum, which of course exceeded the amount of the judgment. 2d. That, if the judgment was not satisfied independently of the agreement, it was so satisfied by reason of the agreement; and 3d, That no interest was payable upon the judgment.

As to the first point, the argument on the part of the appellants was to this effect: That, after 1819, Donovan had no charge on the estate except by virtue of this judgment—that, having received the 385*l.* per annum out of the rents, he must be taken to have received it by virtue of the judgment under which alone he had the right to receive it, and that a prior incumbrancer can in no case, as against a puisne incumbrancer, be entitled to apply rents received by him otherwise than in satisfaction of his incumbrance. It may well be that an incumbrancer is bound to apply what he receives by virtue of his security to the security by virtue of which he receives it; but, looking at this case independently of the agreement, these rents were not received by Donovan by virtue of the judgment, for he never got into possession under the judgment; and if he did not receive the rents under the judgment, I can see no ground on which it can be held that he was bound to apply them in payment of the judgment debt. This judgment was a collateral security for the annuity, it was intended to subsist as long as the annuity subsisted, and the annuity is still subsisting. It was not, as I apprehend, satisfied at law by Donovan's receipts under the agreement; and even if it was so satisfied at law, I take leave to doubt extremely whether, having regard to the purpose for which it was given, a
 * 630 Court of Equity would permit Sir George * Bowyer, or any one claiming under him, to set up at law that it had been satisfied. I am of opinion, therefore, that the appellant's case cannot be maintained upon the first point.

Then, as to the second point, the effect of the agreement of 1817. This part of the case was put forward on the part of the appellants in two points of view ; first, that by the agreement the receiver of the six annuitants was constituted the agent or trustee of Donovan, and Donovan was therefore in possession by his agent or trustee ; and, secondly, that, whether he was or was not in possession by his agent or trustee, the 385*l.* per annum received by him under the agreement was received on account of this judgment, and therefore satisfied it. This agreement, however, was an agreement simply between Donovan and the six annuitants. The receiver was no party to it. He came under no contract or obligation to make any payment to Donovan, except as he might be bound to do so by the direction of the six annuitants. If there had been a breach of the agreement, Donovan's rights and remedies would have been against those with whom he contracted, and not against the receiver. It cannot, therefore, I think, be said that the receiver became the agent or trustee of Donovan by virtue of the agreement, and as to the 385*l.* per annum having been received by Donovan on account of the judgment, the appellant's argument seems to me to be founded on a false construction of the agreement. Donovan's judgments were, no doubt, the cause of the agreement being entered into ; but what Donovan was to receive under the agreement was wholly different from what he was to receive under the judgments ; for, under the judgments, he was to receive the annuities, but under the agreement, he was only to receive the interest of the purchase-moneys which he had paid for the annuities. * It * 631 is true that by the agreement he was to receive the 385*l.* per annum in full for all his claims on the estate by virtue of the judgments, but his claims by virtue of the judgments were not for the amounts of the judgments, but for the annuities for which the judgments were collateral securities. What he was to receive, therefore, he was to receive on account of the annuities, and not on account of the sums for which the judgments were given ; and it may be added, that by the terms of the agreement these receipts were only to be in satisfaction of his claim upon the estate as against the parties to the agreement, not as against the plaintiffs or other incumbrancers. If any thing more were wanting to show that these sums were to be received by Donovan in respect of his annuities, and not of the principal sums secured

by the judgments, the context of the agreement seems to me to furnish it; for, by the proviso, the payment of the 385*l.* per annum is to cease when the annuities are repurchased or determined, and other parts of the agreement show that the six annuitants were dealing in respect of their annuities. The appellants' case, therefore, does not seem to me to be at all assisted by any conclusions to be drawn from the agreement.

There remains, then, only the question whether the judgment carried interest, and I am of opinion that it did. The terms of the statute are general, and I do not see upon what ground we can exclude from its operation judgments which are given by way of security. In principle, indeed, there does not seem to me, with respect to this question of interest, to be any sound distinction between such judgments and judgments for debts actually due. In the one case the debtor can relieve himself by paying the debt; in the other, by performing the obligation. It was said that the statute gives interest upon the judgment debt, not * 632 upon the judgment; but the judgment * debt must surely mean the debt acknowledged by the judgment. In my opinion, therefore, this motion fails on all the points, and ought to be refused with costs.

The Lord Justice KNIGHT BRUCE concurred.

STRONGE *v.* HAWKES.

HAWKES *v.* HAWKES.

1859. June 27, 28, 30. July 18, 19, 20. August 4. Before the LORDS JUSTICES.

J. B. being seised in fee of estates P. and C., and also of other estates, made separate mortgages of P. and C., and by his will devised all the estates to trustees, upon trust by sale or mortgage to raise money to pay his debts and legacies, and subject thereto upon trust for his daughter Mrs. H. for life, for her separate use, with remainder upon such trusts as she should by deed or will appoint. Mrs. H., by virtue of her power, mortgaged P. to A. in fee, by a deed reciting that the testator's debts and legacies had been paid (which was not the fact), and containing an unqualified covenant by Mr.

and Mrs. H. against incumbrances. Subsequently Mrs. H., by virtue of her power, mortgaged C. to Holmes in fee, and made similar mortgages of other parts of the devised estates. *Held*, that, however the case might have stood if these mortgages had been made by virtue of an ownership in fee, the recital and covenant in A.'s mortgage gave him no right to have P. exonerated from the testator's debts and legacies out of C. and the other estates, as against Holmes and the other subsequent mortgagees under the power of appointment.

Held, also, that the charge of debts contained in the will did not give A. any right, as against Mrs. H.'s other mortgages, to have the testator's mortgage on P. paid out of all the devised estates ratably, but that it must be borne by P.

H., the husband of the testator's daughter, was one of the trustees and executors of his will, and also entitled to a life-estate under a settlement, the funds subject to which consisted almost entirely of a large debt due from the testator. H. received the rents of the devised estates for a number of years. At the testator's death the *corpus* of the estates was sufficient to pay debts and legacies. H. paid more than he received in respect of the personal estate, and treating him as having received the rent in right of his wife, and as only bound to keep down the interest on the debts and legacies as tenant for life, there was nothing due from him to the estate. The estate having become insufficient to pay the debts and legacies: *held*, that an account of rents had been properly directed against H., and that what was coming to him in respect of his life-interest under the settlement was liable to be applied in payment of what was found due on such account, and that such liability had priority over the claims of judgment creditors of H., who had obtained a charging order on his life-interest, and that it had priority over the claims of the trustees of his settlement for part of the settled fund received by him.

THESE causes came before the Court on this occasion upon three petitions; one presented by the defendants William Cockayne Adams and Borlase Hill * Adams, another pre- * 633 sented by the defendants William Bird and John Eden, and the third presented by the children of Mr. and Mrs. Hawkes and their trustees.

The circumstances under which the present contention arose were as follows:—

John Blackburne, the testator in the causes, had married in 1798. By a settlement made on his marriage he covenanted that his wife's future property should be held on trusts, under which, in the result, she became absolutely entitled. He also by that settlement secured to her a jointure-annuity charged on property called the Garston Salt Works. By the year 1807 he had received property of his wife to the amount of 12,308*l*. In that

year he mortgaged an estate known as the Wavertree Hall estate to the trustees of the settlement for securing that sum to be paid to them and held by them on the trusts of the settlement. He afterwards received other money of his wife to the amount of about 766*l*. He had an only daughter by a former wife. In 1814 she married Thomas Hawkes. By a settlement dated the 10th of August, 1814, made on the marriage of Mrs. Hawkes, the testator covenanted with the trustees of the settlement for the payment to them of 20,000*l*. (5000*l*. within three years, and 15,000*l*. at his death) on trusts, under which Hawkes was entitled for life, or until bankruptcy or insolvency. The defendant John Shaw Leigh was one of the trustees. Hawkes became a debtor to the trustees of the settlement, for part of the trust fund received by him. The testator did not pay the 5000*l*. at the stipulated time, but he ultimately made two mortgages for securing portions of that sum ; viz., a mortgage of an estate called

Carters for 2495*l*. and a mortgage of his undivided third
 * 634 share of an estate called Parr for 2305*l*. * This third share will, for the sake of brevity, be referred to as "Parr."

By his will dated the 3d of August, 1820, the testator devised his estates to his wife Eleanor Blackburne and his son-in-law Thomas Hawkes, upon trust by mortgage or sale to levy and raise so much money as would be sufficient for payment of his debts, funeral and testamentary expenses and legacies. He gave a legacy of 2000*l*. to Eleanor Blackburne, his wife, and two legacies of 2000*l*. and 1000*l*. to Thomas Blackburne ; and, subject as above, directed his trustees to stand seised and possessed of his real and personal estate upon trust for Mrs. Hawkes for life for her sole and separate use, and after her death upon such trusts as she should by deed or will appoint ; and he appointed Eleanor Blackburne and Thomas Hawkes his executors. He died in the year 1826. His property at his death consisted of an estate called Garston, and of the equity of redemption of the Wavertree Hall estate, Carters and Parr, all of which passed under the devise to his trustees. He had also an estate at Aigburth which descended, and he had also the Garston Salt Works, which were charged with the jointure annuity, and some plant and stock upon a colliery in the Parr estate, called Parr Colliery.

After the testator's death Mr. and Mrs. Hawkes, by means of her power of appointment, borrowed large sums of money upon

the security of the devised estates. The first security was created by indentures of the 11th and 12th of June, 1832, by which they mortgaged the Garston estate to Joseph Redish for 5000*l.*, which mortgage afterwards became vested in the defendants Bird and Eden. By indentures of the 15th and 16th of May, 1835, they mortgaged Parr to Badger and Williams, as trustees for the Dudley Banking Company, for * 10,000*l.* * 635 By indentures of the 29th and 30th of October, 1835, they mortgaged Carters to Holmes and Rushton for 5650*l.* By a deed dated the 12th of August, 1839, they charged Parr with further advances of Badger and Williams. They also created various other mortgages, which it is not necessary to mention. Eleanor Blackburne, the widow, trustee and executrix, joined in the above mortgages to Redish and to Holmes and Rushton, but not in any of the other mortgages.

The mortgage of Parr to Badger and Williams, which, it will be observed, was prior in date to Holmes's mortgage, contained the following recital: "And whereas all the said testator's debts and the legacies so as aforesaid given by his will and codicils have been paid off or effectually secured without resorting to the testator's one-third part or share of and in the lands, mines, hereditaments and premises at Parr aforesaid, which was accordingly exonerated therefrom;" and it contained a covenant on the part of Mr. and Mrs. Hawkes for quiet enjoyment, "free and clear, and freely and clearly acquitted, released, exonerated, and discharged or otherwise by the said Thomas Hawkes and Alice Anna his wife, their and each of their heirs, executors, administrators, and assigns, from time to time and all times thereafter well and sufficiently saved, defended, kept harmless, and indemnified of, from and against all manner of former and other gifts, grants, bargains, sales, leases, mortgages, jointures, dowers, rights and titles of dower, uses, trusts, wills, entails, statutes, recognizances, judgments, executions, rents, arrears of rent, annuities, estates, titles, troubles, charges and incumbrances whatsoever, had, made, done, committed or suffered by the said Eleanor Blackburne, Thomas Hawkes, and Alice Anna his wife, or any of them, or any of their heirs, * executors, * 636 administrators, and assigns, or any other person or persons whomsoever."

John Shaw Leigh acted as solicitor both for Mr. and Mrs.

Hawkes and for Redish in the mortgage transaction of 1832, and for Mr. and Mrs. Hawkes, and Holmes and Rushton in that of October, 1835, and he was a party to the mortgage of May, 1835, to Badger and Williams, in his capacity of dower trustee of the Parr estate.

By indentures of the 29th and 30th of June, 1842, 10,000*l.*, part of the principal moneys due on the securities of the 15th and 16th of May, 1835, and the 12th of August, 1839, to Badger and Williams, was, with the benefit of those securities, transferred to William Adams, since deceased, who thereupon got in some outstanding terms prior in date to the mortgage of that estate which had been made by the testator. He had no notice of that mortgage, but he had notice of the estate being charged with debts and legacies. His security was now vested in the defendants William Cockayne Adams and Borlase Hill Adams, who were his legal representatives.

These suits were instituted for the administration of the testator's estate, as to one of them by Sir James Matthew Stronge, the personal representative and residuary legatee of the widow Eleanor Blackburne, and as to the other of them by the children of Mrs. Hawkes, in respect to the debt due from the testator's estate to the trustees of her settlement.

By the decree the usual accounts were directed. From the report it appeared that Hawkes was largely indebted to the estate in respect of rents and profits received by him, and in respect of the purchase-money of a large portion of the * 637 Aigburth estate, which was sold by him * and his wife — that the debts had been paid, except the debts due to Eleanor Blackburne the widow and to the trustees of Hawkes's settlement, but that the legacies were unpaid — the part of the Wavertree Hall estate had been sold, and that the proceeds of it were insufficient to pay the amount due upon the mortgage of that estate — that the part of the Aigburth estate which had not been sold by Hawkes and wife had been sold in one lot with the Garston and Carters estates, and had produced a large sum of money, which was in Court to the Garston estate account — that the Garston Salt Works were unsold, and the plant and stock of the Parr Colliery were outstanding.

Upon this report the cause was heard before the late Vice-Chancellor Sir JAMES PARKER for further directions.

By the order made upon that hearing on the 4th of August, 1852, the Vice-Chancellor declared that the defendants the Adams were entitled to priority over the mortgage for 2305*l.* and the interest thereon, as a specific charge on the Parr estate, or so much thereof as was comprised in the terms of years which had been got in by Adams; and he ordered the following payments to be made out of the funds standing to the Garston estate account: The costs of the suits, except the costs of Mrs. Hawkes's mortgagees, which were to be added to their mortgages—the arrears of the jointure annuity, which were a charge upon the Garston Salt Works—the balance of the 12,308*l.* and interest (the Wavertree Hall mortgage) remaining unpaid after applying the proceeds of the part of the Wavertree Hall estate which had been sold—the 766*l.* 13*s.* 8*d.* due to the estate of Eleanor Blackburne, and the interest upon it—the principal sums secured by the testator's mortgages on Carters and Parr, which were to be carried to the * settlement account * 638 of Hawkes and his wife in part of the 20,000*l.* secured by the testator's covenant in that settlement—the 15,000*l.*, the remaining part of the 20,000*l.*, which was to be carried to the same account—the interest of the 20,000*l.*, and so far as the funds would extend, the legacies of 2000*l.* and 1000*l.* to Thomas Blackburne, and of 2000*l.* to Eleanor Blackburne, and the interest upon them.

The several payments by this order directed to be made were made accordingly, except the payments in respect of the interest on the 20,000*l.* and in respect of the legacies.

The defendants Bird and Eden, who were entitled to Redish's mortgage, and the defendant Holmes, entitled to the mortgage made to him and Rushton, then appealed from the Vice-Chancellor's order, contending that they were entitled to priority over Mrs. Blackburne in consequence of her having joined in their mortgages. Upon the hearing of the appeal the opinion of the Lords Justices was in favour of the appellants, (a) but they thought it better that the cause should be heard before them on subsequent further directions, and that in the mean time the drawing up of the order upon the appeal should be suspended.

After the hearing of that appeal various proceedings were had in the cause. The Parr estate was sold and the proceeds brought

(a) 4 De G., M. & G. 186.

into Court to the Parr estate account. The remainder of Wavertree was also sold and the proceeds brought into Court to the Wavertree estate account. In pursuance of an order dated the 20th of February, 1854, the interest on the 20,000*l.* debt due

to Mrs. Hawkes's settlement was carried over from the
 * 639 * Garston estate account to an account entitled "The Settlement Life-Interest Account Proceeds of Garston,"

subject to all prior claims. In pursuance of another order bearing date the 29th of February, 1856, the principal of Thomas Blackburne's legacies was paid out of the funds standing to the settlement life-interest account, the Garston estate account, the Wavertree Hall estate and the Parr estate account respectively. The Garston Salt Works were realized, and the amount due in respect of them was fixed by arrangement at the exact amount of the arrears of the jointure annuity. A subsequent report was made of interest on debts and legacies, by which it appeared that Eleanor Blackburne's legacy of 2000*l.*, with all the interest accrued upon it, still remained unpaid.

On the 7th of October, 1853, Mrs. Hawkes died, and her husband thereupon became tenant for life in possession of the funds comprised in their settlement. On the 19th of January, 1854, the defendants William Cockayne Adams and Borlase Hill Adams obtained in respect of the debt due to them from Hawkes a charging order on his life-interest in those funds.

On the 7th of May, 1857, the order which it was sought by the present petitions to review was made by the Lords Justices. At the date of that order all the property of the testator had been realized, and the order had for its object to distribute the funds according to the rights of the parties, and at the same time to set right the different parts of the property with respect to payments which had been made out of funds standing to different accounts, without regard to the particular liabilities to which those funds were subject.

The order accordingly, by paragraph 1, declared that,
 * 640 * by reason of Eleanor Blackburne having joined in and executed the several mortgages to Redish and Holmes, Sir James Matthew Stronge was not entitled to receive or be paid any sum of money out of the proceeds of the Garston estate until after payment of the 5000*l.* (Redish's loan, since vested in Bird and Eden), and the interest thereon, or out of the proceeds of the

estate called Carters, until after the payment of the 5650*l.* (Holmes's loan) and the interest thereon.

Then, after several declarations and directions pointed at setting right parts of the property as to the payments which had been made without regard to the liabilities of the different parts of the property *inter se*, it was declared by par. 5, that the costs which by the order of the 4th of August, 1852, had been directed to be paid out of the funds standing to the Garston estate account, and had been so paid, were properly payable out of the proceeds of so much of the Aigburth estate as was sold with Garston and Carters, and out of the proceeds of Garston, and out of the residue of the proceeds of Carters, after deducting the 2495*l.* and interest; and out of the residue of the proceeds of Parr, after applying thereout 2500*l.* towards payment of the 2305*l.* and the interest thereof; according to the respective amounts of the said part of Aigburth, and of the proceeds of Garston, and of the residues of the proceeds of Carters and Parr respectively, after such deductions as aforesaid.

By par. 8, it was ordered that J. S. Leigh should, on or before the 30th of June, pay into Court, to an account to be intituled "The subsequent Costs Account," the sum of 561*l.* 10*s.* 11*d.*, admitted to be in his hands and to have arisen from the testator's one-third share of the rents and profits of the Parr Colliery. It was also ordered that a sum of 2000*l.* should be raised out of the * several estates in certain specified proportions, and * 641 carried to the same account.

Par. 9 enumerated the several sums paid and remaining to be paid out of the devised estates in respect of the testator's debts and legacies, and directed the aggregate amount to be apportioned between the proceeds of Garston and the aforesaid residues of the proceeds of Carters and Parr respectively, according to the respective amounts of such proceeds and residues of proceeds respectively.

Par. 10 provided for payment out of the proceeds of the Parr estate of what should be apportioned to that estate under par. 9, after deducting the mortgage upon the estate, and a sum which had been already paid out of the estate in respect of the testator's legacies, thus throwing upon the Parr estate what their Lordships then considered to be its due proportion of the debts and legacies; and by this par. 10, what might be apportioned

upon Parr in respect of the debts and legacy due and payable to Eleanor Blackburne was ordered to be carried to an account called "Sir James M. Stronge's Security Account." This account was raised for the purpose of keeping separate what should be coming to Sir J. M. Stronge in respect of those debts and legacy, with a view to its being applied to make good the amount which he had received out of Garston and Carters, to the prejudice of Bird and Eden and Holmes, instead of calling upon him to pay back that amount into Court and afterwards recouping him in respect of that payment. The residue of the funds standing to the Parr account was ordered to be paid to the Adams. The order then, by par. 11, provided for carrying the proceeds of Aigburth sold under the decree to the last-mentioned account.

By par. 12 it was declared that the life-interest of * 642 * Thomas Hawkes under his settlement was liable in the first place to make good the amount due from him in respect of the moneys which he had received from the part of Aigburth sold by him, and in respect of the rents and profits of Aigburth, Garston, Carters and Parr respectively received by him; and a sum of 5429*l.* 9*s.* 1*d.* consols standing to the settlement life-interest account was ordered to be sold, and the proceeds carried over to Sir James Matthew Stronge's security account.

The rest of the order provided for setting right the account between Bird and Eden and Holmes on the one side, and Sir J. M. Stronge on the other side, with reference to the priority which by the early part of the order was declared to have been acquired by Bird and Eden and Holmes.

The funds carried over to Sir J. M. Stronge's security account consisted almost wholly of the proceeds of the accumulation of Hawkes's life-interest. Pursuant to directions contained in the order, Sir J. M. Stronge received out of this account what was due to him for Eleanor Blackburne's legacy and interest, and the sums which he had received out of the Garston estate account and Carters estate account above what he ought to have received out of those accounts, were reimbursed; and after these payments there remained standing to Sir J. M. Stronge's security account the sum of 2153*l.* 10*s.* 8*d.*

On the 23d of June, 1857, Hawkes became bankrupt, and by an order dated the 30th of July, 1858, so much of the funds

standing to "The Account of the Settlement Funds of the Defendant Thomas Hawkes and Alice Anna his Wife and their Children," as was attributable to Mrs. Hawkes's property, was carried over to a separate account. * The residue, * 643 which was attributable to property settled by Mr. Hawkes, amounted to 2277*l.* 0*s.* 9*d.* bank annuities, and was also carried over to a separate account; and it was directed that the dividends to accrue due during the life of Hawkes, or until further order, should be carried over to Sir J. M. Stronge's security account.

The representatives of Adams now presented their petition, praying as follows: 1. That the said sum of 561*l.* 10*s.* 11*d.*, with interest thereon, might be ordered to be paid to the petitioners out of the surplus of the moneys standing to "Sir James Matthew Stronge's security account," and that, subject thereto, directions might be given for the application of the said surplus, and also of the dividends of the said sum of 2277*l.* 0*s.* 9*d.*, 3*l.* per cent bank annuities, or so much thereof as had been and should be properly carried to the last-mentioned accounts, in pursuance of the order of the 30th of July, 1858. 2. That the life-interest of the defendant Thomas Hawkes in the funds comprised in the said settlement of the 10th of August, 1814, or in other the premises made chargeable by the charging order of the 19th of January, 1854, might in the first place be applied in payment of the moneys due upon the judgment debt in respect of which the said charging order was obtained. 3. That the charge of the late defendant William Adams, might be dealt with on the footing that the same was not subject to the debts due from and the legacies bequeathed by the said testator John Blackburne, as between the representatives of the late defendant William Adams and the persons entitled to any mortgages of any part of the same testator's estates of any subsequent date to that charge. 4. That the specific charges on the respective estates of the testator John Blackburne existing at his death might be paid ratably out of all his estates, instead * of being * 644 thrown exclusively on the respective estates specifically charged therewith. 5. That the petitioners might be allowed the costs, charges, and expenses necessarily incurred by them relative to the sale of the Parr estate and the conveyance thereof, and that the same might be taxed and raised and paid out of the funds standing to the credit of "Sir James Matthew Stronge's

Security Account." 6. That so far as necessary for the purposes aforesaid, the said decree of the 7th of May, 1857, and any other decrees or orders made in the said causes might be reheard and varied, and proper directions given for carrying into effect the several matters thereinbefore prayed. The petition concluded with a prayer for general relief.

Bird and Eden by their petition prayed that the 2153*l.* 10*s.* 8*d.* standing to Sir J. M. Stronge's security account, might be paid to them in part discharge of a larger sum remaining due to them on their mortgage. The Hawkeses by their petition asked that it might be paid to them, in part satisfaction of a larger sum due from Hawkes to the trustees of his settlement for part of the trust funds received by him.

Mr. Rolt, Mr. Lewin, and Mr. P. A. Kingdon, for the executors of Dr. Adams in support of their petition. — There are three points to be considered: —

(1) The order in which the estates are to be applied for payment of debts. (2) The way in which, as between two incumbrancers on distinct estates of the common debtor, the general charges on both estates are to be borne. (3) Whether in the case of a solvent estate rents received before the estates are realized are to go to the payment of debts.

* 645 * As to the first point, estates devised in trust to pay debts are to be applied before descended estates; *Milnes v. Slater*. (a) In this case, therefore, the Aigburth estate is to be exonerated from the debts by the devised estates; it was unnecessary to resort to the Aigburth and par. 12 of the decree is, we submit, erroneous in making Hawkes refund what he had received in respect of it. Then, all the mortgages made by the testator are to be taken together and the amount apportioned on the several estates, and the specialty debts are to be treated in the same way. *Carter v. Barnadiston*, (b) *Middleton v. Middleton*. (c)

As to the second point, we ask for a declaration that as between Dr. Adams and any person having, on another part of the devised estates, a charge of later date than his, the debts and legacies are to be paid by the property not subject to his charge. The mortgage of Parr on the 16th of May, 1835, recites that, all the debts and legacies had been paid and secured without resort-

(a) 8 Ves. 295.

(b) 1 P. Wms. 505.

(c) 15 Beav. 450.

ing to Parr, and contains a covenant against incumbrances. This covenant would throw the debts and legacies upon Carters in exoneration of Parr, the mortgage of Carters not having been made till October, 1835. *Averall v. Wade*, (a) *Hamilton v. Royce*. (b) According to cases in Ireland notice of the prior mortgage is not material: *Hartley v. O'Flaherty*, (c) *Aicken v. Macklin*, (d) *Handcock v. Handcock*, (e) *Tressilian v. Caniffe*; (g) and this is reasonable, for it is laches on the part of the later incumbrancer not to make inquiry. Here the * mort- * 646 gagee of Carters had not the legal estate, and must therefore take subject to prior equities, whether he had notice of them or not; but if notice is required, Holmes, the mortgagee of Carters, had notice of the mortgage of Parr, by reason of the knowledge of his solicitor.

As to the third point, the rents were not liable to the interest on the debts. A tenant for life is bound to keep down interest out of the rents, but there is no similar obligations attaching on an owner in fee. Mrs. Hawkes having an absolute power of appointment, was in effect owner in fee, and was not bound to keep down interest. Hawkes was not a defaulter: when the receiver was appointed there was a balance due from the estate to him, and his life-estate was free for us. The Court never resorts to rents for payment of debts till the capital is exhausted. *Schomberg v. Humfrey*, (h) *Stratford v. Ritson*. (i)

Mr. Willcock and *Mr. Harrison*, for the plaintiff. — The substantial question is, whether the plaintiff is bound to give Dr. Adams priority as to Parr. We do not dispute the first proposition of the petitioners, that the devised estates are to be applied in payment of debts before the descended, and the decree observes that rule. Then as to their second point, Mrs. Blackburne was named as a party to the mortgage of the 16th of May, 1835, but she would not execute it. The petitioners therefore

(a) Lloyd & G. 252. [See 2 Sugden V. & P. (8th Am. ed.) 594, note (i), 744, 746.]

(b) 2 Sch. & Lef. 327.

(c) Beatty, 61; S. C. on Appeal, Ll. & G. temp. Plunkett, 208.

(d) 1 Dru. & Wal. 621.

(e) 1 Ir. Ch. Rep. 444.

(h) 1 Dru. & War. 411.

(g) 4 Ibid. 399.

(i) 10 Beav. 25.

have not the same case as if she had concurred, but must rest on the execution by Mrs. Hawkes. The covenant by her did not create a security on the estate but charged her separate estate only. *Owens v. Dickenson*. (a) Now Carters was not her separate estate, a life-interest in it was limited to her separate use, but the fee * was not, and that she had a power of appointment over it is a very different matter: *Vaughan v. Vanderstegen*; (b) and her covenant in the mortgage of Parr on the 16th of May, 1835, cannot make any equity attach on Carters. Carters was subsequently mortgaged by a due exercise of her power of appointment, and that was a good security wholly unaffected by the previous transactions as to Parr. There is no more equity against subsequent appointees than against persons claiming in default of appointment, and a covenant by a married woman clearly would have no effect against them. In *Averall v. Wade*, each judgment creditor had a charge on all the estates, which quite distinguishes that case from the present, and in it *Hamilton v. Royce* was questioned. The only remedy which Badger and Williams had on the covenant, was to make Mrs. Hawkes's separate estate in the other property liable to their debt along with other debts, and if they permitted the rents to be received by Hawkes they could not reclaim them, still less can Adams do so. When he took his security, which was in effect a new transaction, not a transfer, he had distinct notice of the debts due to Mrs. Blackburne, of the debts due on the settlement, and of unpaid legacies. He took his security seven years after the mortgage of Carters to Holmes, he knew that Mrs. Blackburne had refused to concur, he was put upon inquiry and must be taken to have known her position, and that she had concurred in the mortgages of Garston and Carters. As to Aigburth, the testator by the deed of 1812 had charged his whole estate including Aigburth, and Aigburth has been dealt with on this footing. As to the rents, the will fixes a trust on the rents for payment of debts, and the Court rightly resorted to them instead of * to the corpus. *Morris v. Livie*, (c) *Burridge v. Row*, (d) *Eland v. Eland*, (e) *Brearclyff v. Dorrington*. (g) Hawkes had no interest in the rents, the trust

(a) Cr. & Ph. 48, 53.

(b) 2 Drew. 363, 369.

(c) 1 Y. & C. C. C. 380.

(d) Ibid. 183.

(e) 4 My. & Cr. 420.

(g) 4 De G. & Sm. 122.

being for the wife's separate use. The decree directed an account of rents received by the devisees in trust, and the rents went in part to pay what was due to Hawkes on account of the personal estate, which was quite right. Mrs. Hawkes having induced us to give priority on Carters and Garston could not set up any claim to rents as against us, and Adams had nothing to do with any such equity as she might have. He obtained his charging order in 1854 after the decree in 1852, which created the fund to which his charging order applies. He cannot use his charging order for the purpose of rehearing, nor complain of the decree which created the fund in which he claims an interest. If the decree is right we have a priority, if it is wrong Adams has no right to call it in question. *Carter v. Barnadiston* (a) does not apply, for that was a case of devises of distinct estates to several persons.

Mr. Malins and *Mr. Shee*, for Bird and Eden and Holmes. — The appointment by Mrs. Hawkes in favour of Bird and Eden gives them, against the 2153*l.* 10*s.* 8*d.* in Court to Sir J. M. Stronge's annuity account, an equity superior to that of the other mortgagees and prior to the liability of Hawkes to repay what was due to the settlement.

Mr. Bacon and *Mr. Freeling*, for the children of Mrs. Hawkes, referred to *Scott v. Lord Hastings*, (b) and * con- * 649 tended in opposition to the petition of Bird and Eden, that the rents were impounded for debts only, and that the debts having been paid the fund arising from rents reverted to Hawkes, subject to his liabilities, including the equity of his children to have repaid the settled property of which Hawkes had got possession, and that this title was superior to that of the mortgagees.

Mr. E. F. Smith, for Leigh.

Mr. Toulmin, for Rising.

Mr. Rolt, in reply. — The first question of principle is, whether *Averall v. Wade* applies. The rule in that case is unqualified and

(a) 1 P. Wms. 505.

(b) 4 K. & J. 633.

applies even against a purchaser without notice. It is urged that Badger and Williams took with notice that the debts had not been paid — that does not affect the question. It has been urged that we cannot raise the question of notice to the mortgagees of Carters, as we have not raised it on the pleadings, but it did not arise before the decree. Then it is urged that Mrs. Hawkes's covenant cannot have any further effect than to bind her separate estate, but that is not the correct principle. The covenant would bind the estate even if she had not exercised her power, but she did execute her power, and *Holmes v. Coghill* (a) applies. She has by exercising the power made the estate hers, as the donee of a general power makes the property his assets if he exercises it. It is said that our security was not a transfer of that of Badger and Williams but a new one, but we clearly took a transfer, giving us the full benefit of their security. If we

* 650 * succeed on this point, it is not material whether the doctrine of *Carter v. Barnadiston* is held to apply, but I contend that it does apply. It has been urged that it applies only where there are several devisees, but the principle is the same, where there are several incumbrancers on different estates devised to one devisee. The case is founded on the general rule as to marshalling. Here, moreover, we are dealing with a power of appointment, the several appointees take under the will and are in the position of several devisees. The life-interest under the settlement cannot go to the children of Hawkes; he must be considered to have received the rents and applied them according to the trust for the separate use of the wife, and he therefore was not a debtor for those rents. He was under no obligation to pay any thing during his life to the trustees of the settlement, and the argument of the children is unfounded, except so far as relates to the sum which he received out of the *corpus* of the settled funds.

Judgment reserved.

August 4.

The Lord Justice TURNER, after stating the nature of the present petitions, proceeded as follows: —

(a) 7 Ves. 498.

This case is one of great complexity, and it would not, perhaps, be just to complain of the petitioners, William Cockayne Adams and B. H. Adams, for having again brought it in all its details under the consideration of the Court, but for the sake of the parties it is much to be regretted that the points which have now been so ably argued were not all brought forward during the repeated arguments which the case underwent before the order of the 7th of May, 1857, against which this petition is mainly directed, was finally passed.

* In order to explain the conclusions at which I have * 651 arrived on the several points which have been argued on this petition, it is necessary, in the first place, briefly to state the facts on which the points arise. [His Lordship here stated the facts of the case down to and inclusive of the order of the 7th of May, 1857, in nearly the same terms as above, and then proceeded as follows]:—

This order is impugned on the part of the defendants William Cockayne Adams and Borlase Hill Adams, on several grounds:—

1. It appears that the mortgage of Parr to Badger and Williams, which was transferred to the testator of these defendants, and was prior in date to the mortgage of Carters to Redish now vested in the defendants Bird and Eden, contained the following recital and covenant: [His Lordship here stated the recital and covenant set out above.]

It is insisted on the part of these defendants that this recital and covenant created a right on their part to have the debts and legacies thrown upon the Carters estate, in exoneration of the Parr estate. That, under a deed containing such a recital and such a covenant, an owner in fee would be bound to indemnify the mortgaged estates out of other estates belonging to him cannot, I think, be denied. A Court of Equity would enforce the covenant against him, but when the Court is called upon to enforce such a covenant against the alienee for value of the owner, other considerations present themselves. The mortgagee, who has taken the mortgage with the covenant, may have taken it with the knowledge that there were other incumbrances subsisting which might be enforced against the mortgaged estate, as Badger and Williams must be assumed in this case to have done.

* The mortgagee may, as was the case here, have taken * 652 no direct charge upon the other estates of the mortgagor, but have left his mortgagor at liberty to deal with third persons

with respect to those estates. The subsequent mortgagee of the other estates may have had no direct notice of the prior mortgage, as was the case in this instance, with reference to the mortgagee of Carters. He may or may not have had constructive notice of the prior mortgage, and the constructive notice may or may not be notice of the equity arising upon the covenant. All these considerations would, in my judgment require the most mature deliberation before it could be held that even in the case of an owner in fee a covenant of this description could be enforced against a subsequent mortgagee of other estates. The cases in Ireland seem to have gone to a great length upon this point, some of them, I think, to a length which I should hesitate long before I should be inclined to follow, although I do not mean to say that I dissent from those cases, as further consideration might, perhaps, lead me to a different conclusion. I agree, however, in the doubts intimated by Lord ST. LEONARDS in *Averall v. Wade*, and deduced by him from Lord ELDON's observations in other cases as to covenants of this description being enforced against subsequent mortgagees, and I agree also in the doubts expressed by Lord ST. LEONARDS in the same case as to notice of a deed containing such a covenant being notice of the equity arising upon the covenant, especially having regard to what was said by Lord ELDON in some of the cases on charity leases. In this case I much doubt whether, independently of the further affidavit which has been filed on this rehearing, and to which I think we ought not now to attend, we should be justified in imputing to the mortgagee of Carters notice of the mortgage of Parr, and I more than doubt whether, even if the notice could be imputed, it was such as would

* 653 * amount to notice of the equity insisted upon by this petition. Looking to all the circumstances of the case, I should, even if Mr. and Mrs. Hawkes, or either of them, had been seised in fee of these estates, have felt the greatest difficulty in holding that the equity now claimed by these defendants could have been made effectual against the Carters estate; but in this case we have to deal, not with mortgages created by an owner in fee, but with mortgages created under a power. The mortgage of Parr, which contains the covenant, relied on by these defendants, was created by the exercise of Mrs. Hawkes's power, and the mortgage of Carters, against which the covenant is sought to be enforced, was created by the exercise of the same power, and I cannot see my way to hold that the covenant entered into with

one of the appointees can be enforced against another of the appointees any more than it could be enforced against the persons claiming in default of appointment, against whom, it was well pointed out in the argument, it could not of course be made available. Upon this ground, therefore, as well as upon the other grounds to which I have adverted, I am of opinion that the case of these defendants fails upon this their first and principal point.

Another point, which was much insisted on upon the part of these defendants, arises thus. It appears that John Blackburne, the testator, by his will devised all his estates to Eleanor Blackburne and Thomas Hawkes, upon trust in the first place for payment of his debts and legacies. It is insisted, on the part of these defendants, that, under the dispositions of this will, the mortgages which the testator had created in his lifetime on Parr and Carters ought to have been thrown ratably on all the testator's devised estates and not treated as they have been treated by the order of the 7th May, 1857, as charges on Parr and Carters respectively. The cases * of *Carter v. Barnadist-* * 654 *ton*, (a) and *Middleton v. Middleton*, (b) were referred to in support of this argument, but those cases apply only to the question of contribution between several devisees of the equities of redemption of the mortgaged estates. Here there is no such question, the equities of redemption of both estates being devised to the same persons. In such a case as was, indeed, observed in *Carter v. Barnadiston*, there can be no question of contribution. No question can arise with the original devisee, who is owner of all the estates. The only question which can arise is with persons claiming under the original devisee, whether a person so claiming has a right to throw the mortgage debt, or any part of it, on the other parts of the devised estates. That question must depend, not upon any right arising under the will creating the title of the devisee, but upon the right, if any there be, arising upon the instrument creating the title of the person claiming under the devisee. In this case it would depend, not upon the will of the testator, but upon the mortgage of Parr, and in this view of the case I see no foundation for the argument on this point attempted to be raised on the part of these defendants.

Another point, which upon the opening of this petition was relied on upon the part of these defendants, although it was not

(a) 1 P. Wms. 505.

(b) 15 Beav. 450.

much, if at all, insisted upon in the reply, was this, that the descended estates were applicable to the payment of debts in exoneration of the devised estates, but the whole produce of the Aigburth estate, sold since the decree, being the only descended estate from which any produce has been realized, has, under the order of the 7th of May, 1857, been carried to Stronge's security

account and applied to the payment of debts, except as
 * 655 * to part of the produce which has been applied to the payment of costs, and I see no ground, therefore, which these defendants have to complain of the order in this respect.

It was also much insisted upon, in support of this petition, that the order of the 7th of May, 1857, was erroneous in having treated Hawkes as debtor in respect of the rents and profits received by him; but Hawkes was trustee under the will, and the rents and profits are found due from him in the account directed against him as trustee. As between him and the creditors there can be no doubt that he was liable to account for those rents. It was said, however, that the *corpus* of the estate ought first to have been resorted to for the payment of the debts, and that it was sufficient for the purpose. That Mrs. Hawkes being tenant for life under the will was liable only to keep down the interest on the debts; that, taking the account upon this footing, and having regard to the excess of payments made by Hawkes on account of the personal estate, nothing can be due from him on account of the rents and profits, and his life-estate on the death of his wife was free and became subject to the charging order obtained by these defendants; but the charging order obtained by these defendants must be subject to all the equities which had attached upon the fund to which the charging order applies, and assuming all the facts on which this argument proceeded, and that the *corpus* of the estate was originally sufficient for the payment of the debts, it is plain that when the order of May, 1857, was pronounced, both the *corpus* and the rents had become insufficient for the purpose, and I do not see what possible right Hawkes could have to say that he was not liable to account for these rents.

It was also objected on the part of these defendants
 * 656 * that the sum of 561*l.*, the amount of the testator's share of the rents of Parr remaining in the hands of Leigh, mentioned in par. 8 of the order of the 7th of May, 1857, was improp-

erly carried to the costs account, but these were rents with which these defendants could have nothing to do by virtue of their mortgage, and so far as their charging order is concerned they were subject to all prior equities; and, moreover, they would be payable to Hawkes as trustee, and thus become subject to all the liabilities which attach to the other rents. I do not think, therefore, that there is any error in the order in this respect.

It was suggested in the course of the argument upon this petition that the proportion of Stronge's charges falling on Garston and Carters had been paid twice over, once by the payment to Stronge before the order, and again by payment out of Stronge's security account under the order, but this does not appear to me to be the case, for nothing was paid to Stronge out of Garston and Carters under the order, except in respect of the legacy of 2000*l.* and interest, which were remaining unpaid when the order was pronounced, the rest of the order as to what was payable out of Garston and Carters, operating only to set matters right as between Stronge, Bird and Eden and Holmes with reference to the sums which had been received by the former out of the Court to the prejudice to the latter. Again, it was said by *Mr. Kingdon*, that Garston and Carters had not at all contributed to the payment of Eleanor Blackburne's legacy. This, however, is not strictly so, for the proceeds of Garston and Carters, after deducting the mortgages to which Eleanor Blackburn had given priority, go to the payment of this legacy; but it is true to this extent, that the apportioned amounts of this legacy payable out of Garston and Carters are not raised and * applied * 657 in payment of it, nor, as I apprehend, was it necessary to be done, for had it been done the only consequence would have been that the mortgagees of Garston and Carters would have taken the amount so raised, and a larger amount of the legacy would have fallen on the debt due from Hawkes, which was a charge upon the life-interest under the settlement, Mrs. Blackburne not having, as we thought when the order was made, and as I still think, by giving priority to the mortgages of Carters and Garston, done more than to postpone herself as to those mortgages, without affecting her rights as against the other property of the testator, the unpaid debt due from Hawkes, and the contributory portion payable by Parr.

According to the best judgment, therefore, which I have been

able to form upon this case, after having again given it very anxious consideration, I think the order of the 7th of May, 1857, is right, and that this petition of the defendants, William Cockayne Adams and Borlase Hill Adams, is unfounded, so far as it complains of that order or of the other proceedings in the suit. I am reluctant to throw upon these defendants the costs of the petition, but I think that after the repeated arguments which were had upon the case before the order of the 7th of May, 1857, was drawn up, the other parties interested have just reason to complain of having been drawn into contest upon the points involved in that order; and I think, therefore, the petition must be dismissed with costs, except so far as it applies to the 2153*l.* 10*s.* 8*d.*

The next petition to be considered is that of the children of Mr. and Mrs. Hawkes and their trustees. As to this petition, I think that the equity claimed on the part of the testator's estate to be paid the debt due from Hawkes to the estate
 * 658 overrides the equity claimed by * this petition for payment of the debt due from Hawkes to the settlement, and this petition therefore ought also to be dismissed with costs.

There remains, then, only the petition of Bird and Eden, and so much of the petition of the Adamses as applies to the 2153*l.* 10*s.* 8*d.* This fund has arisen from Hawkes's life-interest under the settlement applicable to the payment of the debt due from Hawkes to the testator's estate. If that debt had been paid, a less proportion of the testator's debts and legacies would have fallen upon the estates of Garston, Carters, and Parr respectively; and it seems to me, therefore, that this sum ought to be apportioned to those estates according to their relative values, as fixed by the order of the 7th of May, 1857. The portion attributable to Garston to be paid to Bird and Eden, and the portion attributable to Parr to William Cockayne Adams and Borlase Hill Adams; the portion attributable to Carters seems to me to belong to the children of Mr. and Mrs. Hawkes and their trustees, not by virtue of the claim set up by their petition or as appointees under the settlement, but as entitled in default of appointment under the will.

The Lord Justice KNIGHT BRUCE concurred.

* FRASER v. THOMPSON.

* 659

1859. July 23, 30. Before the Lord Chancellor Lord CAMPBELL and the LORDS JUSTICES.

August 4. Before the LORDS JUSTICES.

A trader previous to and in consideration of his marriage, which was solemnized in pursuance of an engagement of several years' standing, the fulfilment of which had been delayed by circumstances not connected with the state of his affairs, made a settlement of part of his property. After his marriage he was adjudged bankrupt. Before the execution of the settlement he had, to the knowledge of the intended wife, committed acts of bankruptcy subsequent to his contracting the debt due to the petitioning creditor, and within twelve months before the adjudication. *Held*, that the settlement was invalid as against the assignees.¹

The Court has no jurisdiction to order payment out of the suitors' fund of the costs incurred by the solicitor of the suitors' fund as guardian *ad litem* of an infant defendant.

THE bill in this case was filed by the assignees in bankruptcy of Joseph Gardner to set aside an ante-nuptial settlement of part of his property as having been made by him in fraud of creditors. By an order of Court dated the 28th of April, 1858, obtained by the plaintiffs, Mr. Johnson, the solicitor to the suitors' fund, was appointed guardian *ad litem* to an infant defendant. The cause was heard by Vice-Chancellor STUART, who, on the 28th of May, 1859, after delivering an elaborate judgment, dismissed the bill. The facts will be found stated at length in the report of the hearing before the Vice-Chancellor. (a) It was admitted that the husband, when he executed the settlement, was in deeply embarrassed circumstances, and was well known to the intended wife to be so; but the Vice-Chancellor considered that as the marriage had been entered into in pursuance of a *bonâ fide* engagement of several years' standing, the fulfilment of which had been delayed in consequence of circumstances having no relation to the state of the husband's affairs;

(a) 1 Giff. 49.

¹ See Kerr F. & M. (1st Am. ed.) 199, 202, 284; Columbine v. Penhall, 1 Sm. & G. 228; Magniac v. Thompson, 7 Peters U. S. 348; 2 Dart, V. & P. (4th Eng. ed.) 822; Bulmer v. Hunter, L. R. 8 Eq. 46; Richardson v. Horton, 7 Beav. 112.

the consideration of marriage supported the settlement. The short point on which their Lordships reversed the decree will sufficiently appear from their judgments.

* 660 * *Mr. Bacon* and *Mr. Kekewich*, for the appellants, cited *Higinbotham v. Holme*, (a) and *Colombine v. Penhall*, (b) and distinguished the case from *Re M'Burnie* (c) and *Campion v. Cotton*, (d) on which latter case the Vice-Chancellor had chiefly relied.

Mr. Craig and *Mr. J. H. Taylor*, for the bankrupt and his wife, referred to *Belcher v. Lloyd*, (e) *Hardey v. Green*, (g) and relied on *Campion v. Cotton*. (d)

Mr. Malins and *Mr. C. Roupell*, for an infant *cestui que trust*.

Mr. Little, for the trustee.

A reply was not called for.

THE LORD CHANCELLOR. — The Vice-Chancellor appears to have been of opinion that the evidence shows acts of bankruptcy to have been committed by the husband previously to the settlement, with the knowledge of the intended wife, she having herself assisted in concealing him from creditors who came to demand payment of their debts. These acts of bankruptcy appear also on the evidence to have been committed within such a period as to be capable of sustaining the adjudication in bankruptcy which is now in force. Agreeing with the Vice-Chancellor's view of the facts, I cannot agree with his conclusion in point of law. I do not wish to be supposed to question

* 661 the decision in * *Campion v. Cotton*, my judgment turns on the acts of bankruptcy known to the wife. The adjudication relates back to these acts of bankruptcy which were subsequent to the time when the petitioning creditor's debt accrued, so that the property must be considered to have ceased to be the

(a) 19 Ves. 87.

(b) 1 Sm. & G. 228.

(c) 1 De G., M. & G. 441.

(d) 17 Ves. 268.

(e) 10 Bing. 316.

(g) 12 Beav. 182.

property of the bankrupt before the time when the settlement was executed. Marriage is the most valuable of all considerations,¹ but whatever consideration be given for a grant it is necessary to see what the grantor had in him at the time of the grant. Here he had nothing; and, as the wife had full knowledge of the acts of bankruptcy, the settlement cannot be supported under the 133d section of the Bankrupt Law Consolidation Act as a *bond fide* contract for value.

THE LORD JUSTICE KNIGHT BRUCE. — I think it established by the evidence that after the petitioning creditor's debt had been contracted, and before the execution of the settlement, at least one act of bankruptcy was with the contemporaneous knowledge of the intended wife committed by Mr. Gardner within twelve months before the adjudication. On this ground, I think, that the settlement cannot stand. But I wish it particularly to be understood, that I do not give any opinion upon the case apart from this point. Our decision of course does not affect the settlement of the wife's property.

THE LORD JUSTICE TURNER. — I also found my judgment on the facts that an act of bankruptcy was, with the knowledge of the wife, committed by the bankrupt before the execution of the settlement, and that an adjudication of bankruptcy followed within twelve months. I agree with the Vice-Chancellor * as to the high value of the marriage consideration, which * 662 cannot be measured; but no consideration, however valuable, can make subject to the trusts of a settlement property which did not at the time belong to the person who purported to settle it. *Campion v. Cotton* does not at all govern the present case.

A discussion then ensued as to the costs of the solicitor of the suitors' fund. Their Lordships considered it to be the course of the Court that the plaintiff should pay them and add them to his own demand; and the registrar, in reply to a question of the Court, stated that this was looked upon by the registrars as the settled rule. Their Lordships, however, gave leave to the counsel

¹ See *Smith v. Allen*, 5 Allen, 454, 458, 459.

for the plaintiffs to mention the point before the Lords Justices on a subsequent day.

August 4.

Mr. Bacon, for the plaintiffs, asked that the costs incurred by the solicitor to the suitors' fund, in defending the case on behalf of the infant, might be paid out of the suitors' fund. He contended that they were expenses required by the Court for the purposes of the due administration of justice, and ought not to be borne by the plaintiffs, who had no means of getting them over.

15 & 16 Vict. c. 87, § 52, and *Ex parte Allen*, (a) were referred to.

Their Lordships asked Mr. Johnson, the solicitor to the suitors' fund, whether there was any precedent for such an order as was now sought, and were informed that he was not aware of
 * 663 any. * Their Lordships held that they had no jurisdiction to make the proposed order as to the costs, which were disposed of as follows:—

“That the plaintiffs do pay to the infant defendant T. P. Gardner defending the suit by J. J. Johnson, the solicitor to the suitors' fee fund, as his guardian, their costs, to be taxed by the proper taxing master of this Court, and that the plaintiffs be at liberty to add what they shall so pay to their own costs of this suit.”

(a) 3 Mac. & G. 360.

AN INDEX
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ASSETS.

A testator died in 1842 entitled in reversion to a moiety of a settled fund of personalty. His other *property, consisting of real *666 estate charged by his will with debts, was administered by the Court. In 1858, the reversion fell into possession, the trustees of the settlement paid the money into Court under the Trustee Relief Act, and the testator's moiety was paid out to his executors.

Held, reversing the decision of the Court below, that this fund was distributable as legal assets.

Held, further, that this fund must bear a share of the costs of suit, which had been paid out of the equitable assets. — *Mutlow v. Mutlow*, 537.

See **MARSHALLING**.

ATtribution OF PAYMENTS.

In March, 1814, G. B. granted life-annuities of 500*l.*, 460*l.*, and 383*l.* to A. D., in consideration of sums of 3000*l.*, 2760*l.*, and 1998*l.*, and as a

collateral security gave judgments for double those sums. In June, 1814, G. B. granted six annuities to six other persons, and appointed a receiver of the rents of his real estate for securing them. The receiver took possession. A. D. issued elegits on his judgments, and extended one-half of the estate under the first, and the other half under the second, but there was a return of *nil* upon the third. He did not take possession of the estate, but an agreement was, in 1817, entered into between him and the six annuitants, that he should allow the receiver to continue in possession, and should be paid out of the rents 385*l.* a year, being interest at 5*l.* per cent on what he had paid for the annuities. In 1819, A. D. purchased part of the estate, and so extinguished his first two judgments. He continued to receive the 385*l.* a year till 1846. A suit having been instituted by subsequent incumbrancers to enforce their charges :

Held, that, apart from the agreement of 1817, as A. D. had never taken possession, he could not be considered to have received the 385*l.* a year in respect of his third judgment, and therefore was not bound to apply what he received in satisfaction of that judgment.

Held, also, that, under the agreement, A. D. did not receive the 385*l.* a year in respect of his judgments, but in respect of his annuities, and that he was at liberty to apply it in discharge of the first two annuities, though the judgments for securing them had been extinguished. — *Knight v. Bowyer*, 619.

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* 667 * **CHAMBERS (APPEAL FROM ORDER IN).** See **PRACTICE**, 2.
CHAPEL. See **INJUNCTION**, 3.

CHARGE OF LEGACIES. See **LEGACY.**

CHARITY. See **INJUNCTION**, 3. **LIMITATIONS.**

CHARTER-PARTY.

A master of a ship has not, according to English law, any lien on the freight for money expended in fulfilling a charter-party, and it makes no difference that the particular expenditure was expressly required by the terms of the contract, and that the master had no means of meeting it, nor that the charter-party is under seal and made by the master himself, so that the freight could only be recovered in his name. — *Bristow v. Whitmore*, 325.

CLEAR GIFT. See **WILL**, 1.

COLOURABLE TRANSFER. See **COMPANY**, 6.

COMPANY.

1. B. agreed to accept shares in a joint-stock company. Scrip certificates were given to him, but he never executed the deed of settlement nor received certificates of shares. Before the 26th of October, 1853, B.

sold his scrip without giving notice to the company. On the 26th of October, 1853, the directors circulated among the shareholders an advertisement, that the shares of all persons who did not execute the deed before the 21st of November next would be forfeited. On the 4th of May, 1854, a meeting of shareholders passed a resolution that the shares of the persons who should not have executed the deed before the 31st of May, should be absolutely forfeited ; and in June, 1854, a circular was issued by the directors to the shareholders, in which the shares were treated as forfeited. The deed of settlement contained no provisions authorizing such forfeiture. Neither B., nor the transferees from him, ever executed the deed, or claimed to be shareholders. In March, 1858, an order was made for winding up the company.

Held, that B.'s name must be on the list of contributories. — *Re National Patent Steam Fuel Company. Barton's Case*, 46.

2. Although it may be too strict to hold that a director of a company is bound to look back through the minute-book into entries, made in it before he became a director, yet where, subsequently to his becoming a director, he is a party to dealings founded on those noticed in such prior entries, and allows his brother directors to act and proceed upon the notion that he * affirms and adopts the transac- * 668 tions to which such entries relate, and this course of acting goes on during two years, he is precluded from impeaching such transactions, unless he can establish a case of deception or want of due information.

As, on the one hand, a plaintiff who has a right to complain of an act done to a numerous society of which he is a member, is entitled to sue on behalf of himself and all others similarly interested, though no other may wish to sue ; so, on the other hand, although there are a hundred who wish and are entitled to sue, still, if they sue by a plaintiff who is personally precluded from suing, the suit cannot proceed. — *Burt v. British Nation Life Assurance Association*, 158.

3. A company, whose shares were made transferable by delivery of the certificates, is not on that ground illegal by the common law; and the fact that the shares of such a company, formed before 7 & 8 Vict. c. 110, have become vested in other persons since the passing of that Act, does not make it subject to the provisions of that Act. — *Re Mexican and South American Company. Aston's Case*, 320.
4. A bill filed by shareholders in a company against directors alleged, that the directors had purchased shares from the chairman, and that such purchase was a fraud upon the plaintiffs and the other shareholders, and not authorized by the constitution of the company or by the provisions of its deed of settlement, which, so far as it was set out in the bill, did not provide any remedy in such a case. *Held*, that the bill showed a good cause of suit, and a demurrer was overruled.

The bill also alleged that certain shareholders had paid a call, but that the plaintiffs were ignorant of the names of such shareholders. *Held*, that it was not demurrable for not making any of them parties. — *Hodgkinson v. National Live Stock Insurance Company*, 422.

5. Dr. W. having agreed to become one of the medical referees of an insurance company, on the understanding that there would only be two of them, the secretary of the company called upon him, produced the deed of settlement, and induced him to execute it for 200 shares, representing that on his doing so he would be appointed one of the medical referees, of whom there would be only two; that the business would be equally divided between them; that the directors would not consent to his appointment unless he took 200 shares; and that all the office-bearers were required to take and had taken that number. Soon after this, Dr. W. discovered that four medical referees had been named. He thereupon claimed to be released from his shares, and demanded a return of his calls. He afterwards
- * 669 discovered that most of the office-bearers had never *taken 200 shares. *Held*, affirming the decision of Vice-Chancellor KINDERSLEY, that whatever breach of contract there might have been on the part of the company towards Dr. W., there was nothing in the above circumstances to entitle him to be discharged from his liabilities as a shareholder.
- The deed of settlement provided, that if a shareholder should fail to pay a call for two months, the secretary should send him a notice requiring payment within twenty-one days, and if the sum should not be paid within that time, the directors might declare the shares to be forfeited. Dr. W. and others having failed to pay for more than two months, the directors passed a resolution that notices should be sent to them requiring immediate payment, and that unless the calls were paid within twenty-one days, the shares should be irremediably forfeited. A notice was accordingly sent to Dr. W., that if he did not pay his calls within twenty-one days, his shares would be irremediably forfeited. He did not pay. The company went on for three years, during which he was not treated as a shareholder, and did not claim to be one, though his name remained on the register. The company being wound up: *held*, that the declaration of forfeiture, though not strictly regular, complied substantially with the requisitions of the deed of settlement, and that Dr. W. was not a contributory. — *Re Home Counties and General Life Assurance Company. Woollaston's Case*, 437.
6. A trading company was established in 1835, upon the terms contained in the prospectus, which placed its affairs under the management of individual directors, but contained no provision as to the transfers of shares. The certificates of shares purported to give the holder a title to the shares, which accordingly were treated as transferable by delivery of the certificates. *Held*, that the having shares transferable by delivery, was not such an assumption of a corporate character as to make the company illegal.
- A person who buys shares in a trading company is to be taken to have bought them subject to their existing liabilities, and, on the winding-up of the company, is liable to contribute, as well towards debts incurred before as those incurred after the purchase.
- G. and S. bought shares in a company, whose shares passed by delivery of

the certificates. Some of the certificates were not delivered until after an order for winding up the company had been made. *Held*, that G. and S. were contributories in respect of these shares, as well as in respect of those the certificates of which had been delivered before the winding-up order.

P. held 250 shares in the same company, for which he paid 1750*l*. A few days before the winding-up order, he, being aware that the * company was in difficulties, handed over the certificates to a * 670 clerk of his, there not having been any previous negotiation for the sale of them, and the clerk gave him 1*l*. for them. It was not disputed that P. made this transfer in order to escape liability, but the Court was satisfied, on the evidence, that it was an absolute and *bonâ fide* transfer, out and out, without any trust or reservation. *Held*, that P. was not a contributory. — *Re Mexican and South American Company. Grisewood and Smith's Case. De Pass's Case*, 542.

See FRAUD, 5. ULTRA VIRES.

COMPROMISE. See RECTIFICATION.

CONFIRMATION. See FRAUD, 2.

CONSIDERATION. See VOLUNTARY DEED, 1, 2.

CONSTRUCTION. See WILL.

CONTRIBUTORY. See COMPANY, 1, 5, 6. FRAUD, 5.

CONVEYANCE.

A vendor being entitled under a limitation to uses to bar dower, without a power of appointment, the purchaser insisted on the concurrence of the dower trustee. The trustee being abroad, the vendor filed a bill to enforce specific performance, without his being a party to the conveyance. The Vice-Chancellor held, that the objection was well founded, and made a decree for specific performance, with an order vesting the estate of the dower trustee in the purchaser upon the execution of the conveyance by the vendor; but considering the objection, though tenable, to be frivolous and vexatious, he gave no costs to either party.

Held, on appeal by the purchaser, that the objection was frivolous and vexatious, and ought not to have been insisted on; and that costs ought not to be given to the purchaser. Whether it was a tenable objection, *quære*. — *Collard v. Roe*, 525.

CORPORATION (PRODUCTION OF DOCUMENTS BY). See PRACTICE, 4.

COSTS.

1. A will, executed under very suspicious circumstances by a testator whose testamentary capacity there was reasonable ground for disputing, was established as regarded personal estate by proceedings in Ecclesiastical Court and before the Judicial Committee, to which H. was a party, as one of the next of kin. After this, at the hearing of a suit instituted by the devisee, H., who was also the heiress-at-law, asked for an issue *devisavit vel non*, which was * granted. * 671 Further evidence was adduced on both sides, and the jury found in favour of the will.

Held, that under the circumstances, the asking for an issue was not such vexatious and unreasonable conduct as to make H. liable to pay costs,

but that as she had asked for it with full knowledge of the former proceedings, the result of which made it very improbable that she could succeed on the trial, she ought not to receive costs. — *Stacey v. Spratley*, 199.

2. Costs cannot be given to a party as against the Crown, except in cases falling within the Statute 18 & 19 Vict. c. 90.

Form of order providing for the costs of a party entitled under that statute to receive them from the Crown. — *Attorney-General v. Hanmer*, 205.

3. When a plaintiff becomes bankrupt or insolvent, if the assignee does not proceed with the suit, the bill will be dismissed without costs, and the common form of order will not be departed from, though the plaintiff has taken steps in the suit without giving notice of the bankruptcy or insolvency, and so led the defendant to incur costs subsequently to and without notice of it. — *Meiklam v. Elmore*, 208.

4. Where a mortgage in fee had been paid off to the mortgagee's executor, and a petition was presented under the Trustee Act, 1850, by the mortgagor, for a reconveyance from the mortgagee's heir, who was a lunatic, or for a vesting order: *held*, that the mortgagor must pay the costs of the proceeding. — *Re Stuart, Ex parte Marshall*, 317.

5. A plaintiff ought not to suffer in costs for having presented his case in every way in which it may reasonably appear necessary to bring it before the Court. — *Perry v. Shipway*, 313.

6. Costs of successful appeal ordered to be paid by the respondent. — *Collins v. Burton*, 612.

See ASSETS. PRACTICE, 11.

CREDITOR. See FRAUD, 5. INJUNCTION, 1.

CROSS-BILL. See DEED.

CROSS REMAINDERS. See WILL, 3.

CROWN (COSTS OF). See COSTS, 2.

CROWN (RIGHT OF, TO SHORE). See SHORE.

DEED.

- The holder of one hundred and twenty 20*l.* shares in a company, having afterwards become entitled to sixty additional 2*l.* shares, instructed
- * 672 * his broker to sell the latter. The broker obtained from him blank transfers with stamps sufficient to pass the 20*l.* shares, and filled in the blanks for the descriptions of the shares with those of the 20*l.* shares, leaving the name of the transferees in blank. The shares were purchased by jobbers, the blanks for the names of the transferees remaining in blank, which appeared to be a common course of dealing. The jobbers afterwards sold them, and filled in the names of the ultimate purchaser. *Held*, that the transfer in blank was void, and that the first-mentioned holder was entitled to have the shares delivered up, and their registration in the name of the purchaser restrained. *Held*, also, that any equities arising from the conduct of the first holder could not be set up as a defence to a suit by him for the above purposes, but could only be insisted upon (if at all) by cross-bill. — *Taylor v. Great Indian Peninsula Railway Company*, 559.

DEED (FRAME OF). See VOLUNTARY DEED, 2.

DELAY. See FRAUD, 1, 2. LEGACY.

DEVISABLE INTEREST. See FRAUD, 1.

DEVISAVIT VEL NON. See COSTS, 1.

DIRECTORS. ACQUIESCENCE BY. See COMPANY, 2. FRAUD BY. See FRAUD, 5.

DISCLAIMER.

A receiver distrained under a power accompanying a mortgage, and — the mortgagor being bankrupt, and the proceeds of the distress having been invested, by arrangement, in the names of trustees, to abide the decision of the Court on the rights of the parties — the mortgagee filed a bill against the assignees, and against other defendants who held a bill of sale on the goods taken under the distress, but who by their answer denied that they disputed the plaintiff's right to the proceeds, and who disclaimed all interest in them. *Held*, that a decree might be made declaring the assignees entitled to the property, and that the disclaiming defendants were not entitled to an inquiry as to the relative rights of themselves and their codefendants, the assignees. — *Jolly v. Arbuthnot*, 224.

DISMISSAL FOR WANT OF PROSECUTION. See COSTS, 3.

DOWER TRUSTEE. See CONVEYANCE.

ENROLMENT, OF DECREE. See PRACTICE, 6, 7, 9.

EQUITY. See VENDOR AND PURCHASER.

*EQUITABLE ASSETS. See ASSETS.

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EVIDENCE. See NEW TRUSTEES.

EXAMINATION VIVA VOCE. See PRACTICE, 10.

EXCEPTION (FROM RESIDUE). See WILL, 6.

EXCHANGE (BILL OF). See EXECUTORS.

EXECUTORS.

Executors carried on their testator's trade in that character and in the ordinary course of the business accepted a bill of exchange, describing themselves in it simply as executors of their testator. *Held*, that neither the above circumstances, nor the form of the acceptance, relieved the estate of one of the executors, who died in the lifetime of the other, from the ordinary equitable liability upon the bill. — *Liverpool Borough Bank v. Walker*, 24.

FORFEITURE. See COMPANY, 1, 5.

FRAUD.

1. A person who has sold an estate under circumstances which entitle him in equity to have the sale set aside, has in the estate an interest of such a nature as to be devisable even by a will made before the passing of the Wills Act.

Purchase by a solicitor from his client set aside under the circumstances on a bill filed two years after the death of the solicitor, and nearly eighteen years after the death of the client.

The rules of equity as to a purchase by a solicitor from his client, and the operation of lapse of time upon the right to relief in respect of such a transaction, considered. — *Gresley v. Mousley*, 78.

2. An agreement between a solicitor and a client, without the intervention of any other solicitor, to allow the solicitor interest on his bill of costs, cannot be maintained independently of subsequent acquiescence, unless it appears that he informed the client that the law allowed no such charge.

But where the relation of solicitor and client had ceased after such an agreement had been made, and the client subsequently (having in the mean time had proper advice upon the subject of the agreement) entered into a second agreement with the solicitor, in part founded on the former, which she did not seek to impeach till fourteen years after its date : *held*, that there had been such delay and acquiescence as to preclude any title to relief. — *Lyddon v. Moss*, 104.

- * 674 3. A person, though innocent, cannot avail himself of an advantage obtained by the fraud of another, * unless there is some consideration moving from himself.

A debtor and his surety persuaded the creditor to accept from the debtor a transfer of a mortgage, which the debtor knew to be imaginary, but which the surety, relying on the debtor's statement, believed to be a good security. Afterwards the creditor, at the request of the surety, who suggested to him that he was secured by the mortgage, released the surety. Some friends of the surety, on the faith of this release, lent him money to enable him to compound with his other creditors, which the creditor, at the time of giving the release, knew that they had refused to do, unless the release was given. *Held*, affirming the decision of the Vice-Chancellor, that the creditor was entitled to be restored to his rights against the surety.

Held, also, by the Vice-Chancellor, that the creditor was entitled to such relief only upon the terms of repaying to the surety's friends the sums lent by them, with the right of standing in their place against the surety; but, on appeal, the provisions in their favour were struck out, and the decree made simply without prejudice to their rights. — *Scholefield v. Templer*, 429.

4. A young man of the age of seventeen, previous to his marriage with a woman possessed of personal property, executed a marriage settlement, by which he covenanted to pay 1000*l.* to the trustee. Before executing it, being asked by the solicitor of the intended wife whether he was of age, he said he believed he was. The intended wife, however, knew that he was not. After the marriage he received the wife's personal estate, and after her death refused to pay the 1000*l.* *Held*, reversing the decision of the Court below, that, as the wife was not misled by the misrepresentation, the settlement was not binding upon the husband when he came of age. — *Nelson v. Stocker*, 458.

5. The charter of a company empowered the directors to increase the capital by the issue of new shares of 100*l.* each, but not by less than 10,000*l.* at a time, and it was provided, that the additional capital derived from such new shares should not be published and declared as a portion of the capital of the company till the Board of Trade was satisfied that the whole amount of the increase of capital from time to time determined on had been subscribed for, the shares

issued, at least 50*l.* per share paid up, and a supplementary deed executed by the persons taking the shares. An issue of 2000 new shares was determined upon, the subscribers to be entitled to 5*l.* per cent interest on the sums paid by them until they had paid up 50*l.* per share, and afterwards to participate in dividends. M. took some of them, paid up 50*l.* per share, and executed a supplementary deed, obtained certificates * of shares and received interest, but * 675 only a small part of the 2000 shares were ever subscribed for.

The sums received in respect of them were entered in the reports under the head of liabilities. *Held*, that M. was a shareholder liable to be placed on the list of contributories, and not entitled to rank as a creditor for what he had paid.

The directors of a company from time to time made to the general meetings of shareholders and printed and published false and fraudulent reports of the affairs of the company. There was nothing to show that the shareholders were aware of the falsehood of these reports. An issue of new shares being made, M. was induced by these reports to take some of them. *Held* (overruling *Brockwell's Case*, 4 Drew. 205), that, notwithstanding the fraud, he was liable to be placed on the list of contributories. — *Re The Royal British Bank. Mixer's Case*, 575.

See COMPANY, 5.

FRAUDS (STATUTE OF).

A mortgagee, with power of sale, of real estate informed L., the mortgagor, that he should sell it for 220*l.*, unless more were offered. It was thereupon verbally agreed between L. & W. that W. should buy it on L.'s behalf for 230*l.*, and have a lien on it for that sum; that L. should pay interest, and continue to occupy the part he then occupied, and that W. should receive the rents of the rest to reduce the principal. An offer by W. to purchase for 230*l.* was then sent by L.'s agent to the mortgagee, who accepted it, and under his power of sale conveyed to W.'s infant daughter by W.'s direction. L. continued in the occupation of the part he was to occupy, and paid interest, W. receiving the rents of the rest. This continued for about ten months, when W. died. After his death, the daughter, by her guardian, brought ejectment, claiming to be absolute owner. *Held*, that the Statute of Frauds was no defence to a bill by L. to enforce the agreement.

Per the Lord Justice KNIGHT BRUCE. — L.'s continuance in possession after the conveyance, being referable only to the verbal agreement, amounted to part performance of that agreement, and excluded the operation of the statute.

Per the Lord Justice TURNER. — Without reference to part performance, the Statute of Frauds was no defence, because W.'s insisting on the conveyance as absolute when it had been agreed that it should be a mortgage, was a fraud, and the Statute of Frauds is not allowed by Courts of Equity to cover fraud. — *Lincoln v. Wright*, 16.

FREIGHT. See CHARTER-PARTY.

* 676 * GLEBE LAND. See MINES.

GUARDIAN AD LITEM. See PRACTICE, 11.

HEIR-AT-LAW. See COSTS, 1.

HUSBAND AND WIFE.

After a separation between a husband and wife an action was brought by the wife's mother against the husband for necessities supplied to the wife, and was settled by arbitration. Under the award two deeds were executed, by one of which a previous post-nuptial agreement and warrant of attorney were recited, and in pursuance of them an annuity was made payable to the wife for her separate use out of trust property to which the husband was beneficially entitled. By the other deed covenants were entered into by trustees on behalf of the wife that she would not molest the husband, and for indemnifying him against her debts, and that out of the annuity granted by the other deed the wife would support the children whom the husband covenanted to leave under her charge; and there was a proviso in the latter deed making it void on the husband and wife again cohabiting. The wife's conduct rendered her unfit to have the care of the children. *Held*:-

1. That the annuity deed was not merely voluntary or incomplete, but created an effectual trust not affected by the wife's conduct.
2. That the two deeds were not so connected as to render the validity of the annuity deed dependent on that of the other.
3. That after subsequent cohabitation the children had no title to maintenance out of the annuity. — *Crouch v. Waller*, 302.

ILLEGAL AGREEMENT. See ULTRA VIRES.

INCONSISTENT TITLE. See PLEADING.

INCUMBRANCER. See ATTRIBUTION.

INFANT. See FRAUD, 4. PRACTICE, 11.

INJUNCTION.

1. A bill-holder brought an action against the executors of the drawer, and obtained judgment under the Bills of Exchange Act, before the will was proved by them, they not having applied for leave to defend. Execution was levied, but before any sale (the executors having in the mean time proved the will), a creditor obtained on summons an administration decree. *Held*, that the plaintiff in the administration suit was not entitled to an injunction to restrain further proceedings under the execution. — *Marriage v. Skiggs, Re Skiggs*, 4.

- * 677 * 2. Where property, either immovable or movable, is disposed of with notice of a prior contract entered into by the person disposing of it for its use in a particular manner, the person taking it with such notice may be restrained from using it otherwise.

The Court will not affirmatively enforce a charter-party, but it is implied in such a contract, that if the charterer provides a cargo, the ship shall not be employed for any other purpose; and a mortgagee, with notice of a prior charter-party effected with the mortgagor, will be in general

restrained from doing any thing to prevent its performance. Where, however, the mortgagor in such case was unable to put the ship into proper repair to make the voyage, or otherwise to perform the contract, and the charterer took no step for several months with respect to it : *held*, that the mortgagor ought not to be further restrained from exercising the powers contained in his mortgage. — *De Mattos v. Gibson*, 276.

8. A chapel was conveyed to trustees appointed by the majority of the men communicants of a congregation of Dissenters for the use of the congregation. According to the ordinances of the society, the pastor was to be first invited to officiate for a certain time by way of probation, and, if approved, was elected by a majority at a church meeting called for that purpose. A pastor was invited to officiate for a year, but before the expiration of that time was displaced by a majority of the trustees, on the ground of alleged misconduct. At a meeting professing to be a church meeting, but not duly called, it was resolved that the probationary pastor should become pastor, and that new locks should be placed on the chapel door. By means of locks affixed in pursuance of this resolution, a minority of the trustees retained possession of the chapel, and the probationary pastor continued to officiate after the probationary period had expired. *Held*, that the majority of the trustees were entitled to an injunction to restrain such use of the chapel. — *Perry v. Shipway*, 853.
4. Where equitable relief by way of injunction is sought in aid of a legal right, the Court, unless such right is clear, will not, except with the consent of both parties, declare the legal right and grant a perpetual injunction founded on such declaration, but will require the question to be tried at law. In a case where the defendants claimed a right under an Act of Parliament to do the acts sought by the bill to be restrained, a perpetual injunction was granted by one of the Vice-Chancellors. *Held*, on appeal, that it not being clear upon the construction of the Act of Parliament that it did not authorize what the defendants proposed to do, they were entitled to the opinion of a Court of Common Law upon the question. — *Mayor, &c. of Cardiff v. Cardiff Waterworks Company*, 596.

See LEASE. ULTRA VIRES.

INTEREST.

1. P. carried in a claim as an incumbrancer upon real estate in respect of an annuity, and in November, 1855, the chief clerk certified 100*l.* to be due to him for arrears. The cause did not come on for further consideration till July, 1858. P. then claimed interest on the 100*l.* from the date of the certificate as against subsequent incumbrancers. *Held*, that as the payment of the arrears had been delayed merely through hindrances in the prosecution of the suit, and not in consequence of misconduct or improper attempts to evade payment, interest ought not to be allowed, and that the statute 3 & 4 Will. 4, c. 42, § 28, did not alter the case.
- Held*, also, that the chief clerk's certificate, though adopted by the judge, was not an order for payment of money within 1 & 2 Vict. c. 110,

§ 18, so as to make the sum found due carry interest. — *Earl of Mansfield v. Ogle*, 38.

2. *Held*, that a judgment given for securing an annuity, carries interest under 1 & 2 Vict. c. 110, § 17. — *Knight v. Bowyer*, 619.

See RECTIFICATION.

INTESTACY. See WILL, 3.

INVESTMENT.

An investment in railway mortgages and railway debenture stock: *held*, not to be authorized by a power to invest "upon the securing by way of mortgage of any freehold, copyhold, or leasehold hereditaments." — *Mortimore v. Mortimore*, 472.

ISSUE AT LAW. See COSTS, 1.

JOINT-STOCK COMPANIES ACT. See COMPANY, 3.

JUDGMENT. See INTEREST, 2.

JURISDICTION (SERVICE OUT OF). See PRACTICE, 5.

LACHES. See FRAUD, 1, 2. LEGACY.

LAPSE. See WILL, 6.

LEASE.

A dwelling-house, with grounds and ornamental water, were demised together, with the control of a plantation (which was on the opposite side of the ornamental water, and belonged to the lessor,
* 679 * but was not demised to the lessee), for the purpose of preventing trespassers thereon, but so as not to interfere with the persons employed by the lessor, his heirs or assigns. The lease referred to a plan on which the plantation was represented.

Held, that on the construction of the lease as explained by the plan, the lessor was not at liberty during the term to destroy the plantation, and an injunction was granted to restrain him from so doing. — *Nicholson v. Rose*, 10.

LEGACY.

A legacy was bequeathed with a direction that it should be paid as soon as conveniently might be after the testator's death, which took place in 1822. An annuity charged by the will on real estate terminated in 1856. In 1858 the legatee filed a bill, insisting that the legacy was charged on the real estate, and ought to be paid out of a fund arising from it, and set apart to answer the annuity. The bill made the trustees of this fund parties, but no personal representative of the testator. It was not proved that the personal estate was exhausted. *Held*, that, whether the real estate was charged or not with the legacy, the personal estate was primarily liable, and that the bill was too late, and was defective for want of parties, and leave to amend at the hearing was refused. — *Bright v. Larcher*, 608.

See WILL, 8.

LEGAL ASSETS. See ASSETS.

"LEGAL PERSONAL REPRESENTATIVES." See WILL, 5.

LEGAL RIGHT. See **INJUNCTION**, 4.

LEGATEE (MISDESCRIPTION OF). See **WILL**, 4.

LIEN. See **CHARTER-PARTY**.

LIMITATIONS (STATUTE OF).

The decision of the House of Lords in *Attorney-General v. Magdalen College* (6 H. of L. Ca. 206), *held* to govern a case where charity land had not been aliened in fee, but had been held under a lease for 500 years, at a rent which had been regularly paid. The Statute of Limitations was consequently held a bar to a suit instituted after the statutory period to set aside the lease. — *Attorney-General v. Davey*, 136.

LUNACY.

Where a lunatic who had recovered petitioned for a *supersedeas* of the commission, *held*, that the Court could not order him to pay the expenses incurred with reference to it. — *Anonymous*, 103.

LUNATIC MORTGAGEE. See **COSTS**, 4.

• **MARRIAGE SETTLEMENT.**

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A trader previous to and in consideration of his marriage, which was solemnized in pursuance of an engagement of several years' standing, the fulfilment of which had been delayed by circumstances not connected with the state of his affairs, made a settlement of part of his property. After his marriage he was adjudged bankrupt. Before the execution of the settlement he had, to the knowledge of the intended wife, committed acts of bankruptcy subsequent to his contracting the debt due to the petitioning creditor, and within twelve months before the adjudication. *Held*, that the settlement was invalid as against the assignees. — *Fraser v. Thompson*, 659.

MARRIED WOMAN. See **PRACTICE**, 8.

MARSHALLING.

J. B. being seised in fee of estates P. and C., and also of other estates, made separate mortgages of P. and C., and by his will devised all the estates to trustees, upon trust, by sale or mortgage, to raise money to pay his debts and legacies, and subject thereto upon trust for his daughter Mrs. H. for life, for her separate use, with remainder upon such trusts as she should by deed or will appoint. Mrs. H., by virtue of her power, mortgaged P. to A. in fee, by a deed reciting that the testator's debts and legacies had been paid (which was not the fact), and containing an unqualified covenant by Mr. and Mrs. H. against incumbrances. Subsequently Mrs. H., by virtue of her power, mortgaged C. to Holmes in fee, and made similar mortgages of other parts of the devised estates. *Held*, that however the case might have stood if these mortgages had been made by virtue of an ownership in fee, the recital and covenant in A.'s mortgage gave him no right to have P. exonerated from the testator's debts and legacies out of C. and the other estates as against Holmes and the other subsequent mortgagees under the power of appointment.

Held, also, that the charge of debts contained in the will did not give A. any right, as against Mrs. H.'s other mortgages, to have the testa-

tor's mortgage on P. paid out of all the devised estates ratably, but that it must be borne by P.

- * 681 H., the husband of the testator's daughter, was one of the trustees and executors of his will, and also entitled to a life-estate under a settlement, the funds subject to which consisted almost entirely of a large debt due from the testator. H. received the rents of the devised estates for a number of years. At the testator's death the *corpus* of the estates was sufficient to pay debts and legacies. H. paid more than he received in respect of the personal estate, and treating him as having received the rent in right of his wife, and as only bound to keep down the interest on the *debts and legacies as tenant for life, there was nothing due from him to the estate. The estate having become insufficient to pay the debts and legacies : *held*, that an account of rents had been properly directed against H., and that what was coming to him in respect of his life-interest under the settlement was liable to be applied in payment of what was found due on such account, and that such liability had priority over the claims of judgment creditors of H., who had obtained a charging order on his life-interest, and had priority over the claims of the trustees of his settlement for part of the settled fund received by him. — *Stronge v. Hawkes*, 632.

MASTER (OF SHIP). See CHARTER-PARTY.

MINES.

The coal under parts of the glebe of a vicarage had, at different times since 1756, with the consent of the vicars for the time being, been gotten by the persons working adjoining collieries, and royalties had been paid to the vicars for the time being, the working being conducted solely by underground passages from the adjoining collieries, without entering on the surface of the glebe. *Held*, that no presumption could be drawn from these facts that there had been any grant authorizing the vicars to open mines. — *Bartlett v. Phillips*, 414.

MINISTER OF CHAPEL. See INJUNCTION, 3.

MISDESCRIPTION (OF LEGATEE). See WILL, 4.

MISREPRESENTATION. See FRAUD, 3.

MISTAKE. See RECTIFICATION.

MORTGAGE.

A deed was executed by a legal mortgagee of leasehold, the executor of the mortgagor, and a new mortgagee, whereby in consideration of the payment by the new mortgagee of the old mortgage debt, the discharge of which the old mortgagee thereby acknowledged, and in consideration of a further advance to the executor of the mortgagor by the new mortgagee, the old mortgagee and the executor assigned the mortgaged premises to the new mortgagee, with a new covenant by the executor of the mortgagor for payment of the aggregate sum, and a new proviso for redemption. The deed contained no assignment of the old mortgage debt, but the operative words extended in the usual way to all the right and title of the old mortgagee in the premises. *Held*, that the old mortgage was not extinguished as far as regarded priority over a subsequent incumbrance.

Where leaseholds were subject * to a first mortgage, an annuity and * 682 subsequent incumbrances, and the rents were sufficient to keep down the interest on the first mortgage : *held*, that it was a proper case for an immediate sale at the first mortgagee's instance. — *Phillips v. Gutteridge*, 531.

See RECEIVER.

MORTGAGEE (LUNATIC.) See COSTS, 4.

MORTGAGEE (IN POSSESSION). See ATTRIBUTION.

NEGATIVE COVENANT. See INJUNCTION, 2.

NEGLIGENCE. See SOLICITOR.

NEW TRUSTEES.

On a petition for appointing new trustees of a will containing gifts to classes, an affidavit of the solicitor was received as sufficient evidence of the persons constituting the classes, without the production of baptismal and other certificates. — *Re Hoskins*, 436.

NOTICE. See INJUNCTION, 2.

OPTION TO PURCHASE. See WILL, 7.

ORDER IN CHAMBERS. See PRACTICE, 2.

PAROL EVIDENCE. See WILL, 4.

PART PERFORMANCE. See FRAUDS (STATUTE OF).

PARTIES. See COMPANY, 4. CONVEYANCE. LEGACY.

PAUPER. See PRACTICE, 3.

PERSONAL OCCUPATION. See WILL, 3.

"PERSONAL REPRESENTATIVES." See WILL, 5.

PETITION OF RIGHT.

Leave given to a petitioner who had presented a petition of right to file a bill against the Attorney-General, notwithstanding the issuing of a commission under the petition of right. — *Re Roll*, 44.

PLAINTIFF (ON BEHALF OF SELF AND OTHERS.) See COMPANY, 2.

PLEADING.

Where an heir-at-law filed a bill to set aside, as unduly obtained, a will purporting to dispose of real * estate, alleging the existence * 683 of an outstanding legal estate, or in the alternative to have the benefit of legacies on the ground of their being void under the Mortmain Act, but failed to prove the existence of any outstanding legal estate, the bill was dismissed (without prejudice to the right to file another), as to the former alternative for want of equity, and as to the latter alternative as being premature, Lord Justice KNIGHT BRUCE, who thought that the bill might have been retained, to afford an opportunity of trying the question of the validity of the will, not agreeing in the dismissal. — *Wright v. Wilkin*, 141.

See COMPANY, 2, 4. COSTS, 5.

PRACTICE.

1. Assignees in bankruptcy, who were defendants in a suit, had caused the plaintiff to be summoned and examined before the Court of Bankruptcy under the provisions of the Bankrupt Law Consolidation Act on the subject of the suit. *Held*, that they ought not to be ordered to produce, on a summons for production of documents, a copy of the examination. — *Gandee v. Stansfield*.
2. An appeal directly from Chambers, heard where the Judge had made the order in person, and declined to adjourn the matter into Court to be argued by counsel. — *Ridgway v. Newstead*, 15.
3. Leave given to a married woman to prosecute an appeal *in forma pauperis*, without a next friend. — *Crouch v. Waller*, 43.
4. Production of documents in the possession of a corporation being sought after decree, an order was made directing the company to file a schedule of documents verified by the affidavit of one or more of their officers, unless the company should before a given day satisfy the Court by sufficient evidence, that such affidavit could not be obtained. — *Ranger v. Great Western Railway Company*, 74.
5. The Court has a discretion as to whether it will order service of copy bill out of the jurisdiction, under the 33d Order of May, 1845 (Consol. Ord. 1860, x. 6).

Course to be taken by a defendant who considers that an order for such service upon him ought not to have been made.

- M. filed a bill to set aside for fraud a purchase from her by J. D., deceased, of shares in a Scotch trading company. J. D. had died domiciled in Scotland, and leaving no property in England. A., B., and C. were his executors in Scotland, but he had no personal representative according to the law of England. A. and B. were resident in Scotland, C. in England; and some of the shares in question were alleged to be standing in C.'s name. *Held*, by the Lord Justice KNIGHT BRUCE, affirming the decision of the Master of the Rolls, that service upon A. and B. in * Scotland ought to be ordered. — *Maclean v. Dawson*, 150.

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6. The costs of an infant defendant in a suit, in which there had been a great amount of litigation, and in which he was unsuccessful, were ordered to be paid out of the estate, on the understanding that no further litigation should take place. He attained twenty-one shortly before the expiration of five years, within which the decree might be enrolled, and two years afterwards applied for leave to enrol the decree. *Held*, not a case in which it was just and expedient to make the order. — *Monypenny v. Dering*, 175.
7. *Held*, that a *caveat* against the enrolment of a decree had not been prosecuted with effect within twenty-eight days by the appellant merely obtaining and serving within that period an order to set down the appeal, but that it ought to have been actually set down, and notice given within the period limited by the order.

But where the notice from the record and writs clerks' office only required the obtaining and serving the order to set down the appeal: *held*, that the appellant, who took those steps only within the period limited, might be considered to have been misled as to the practice,

and that the enrolment might as a matter of indulgence be vacated.
— *Pearce v. Lindsay*, 211.

8. A married woman who had obtained a protecting order under 20 & 21 Vict. c. 85, § 21, on the ground of causeless desertion, was made a defendant without her husband to a suit for the administration of the estate of a testator who died after the alleged desertion, giving her a beneficial interest in his property; and a decree was made for accounts and inquiries. Shortly after this the protecting order was discharged on the application of the husband, on the ground that there had never been any desertion. The plaintiff thereupon obtained a supplemental order under 15 & 16 Vict. c. 86, § 52, to bring the husband before the Court. *Held*, that such an order was proper.

Per the Lord Justice TURNER. — Whether such an order would have been proper if the wife had been the executrix, *quære*. — *Rudge v. Weedon*, 216.

9. An enrolment of a decree ought not to be vacated except on strong grounds of surprise, or in a case approaching deception or *mala fides*. Where, therefore, some communications had passed between the solicitors with reference to an appeal, and on an application of the unsuccessful party to vacate the enrolment, his solicitor made an affidavit, but did not state that he had been misled, the application was refused. — *Wildman v. Lade*, 401.

10. The proper time for an application under 15 & 16 Vict. c. 86, § 39, for an examination *viva voce* * in Court, is at the hearing * 685 of the cause. — *Raymond v. Brown*, 530.

11. The court has no jurisdiction to order payment out of the suitors' fund of the costs incurred by the solicitor of the suitors' fund as guardian *ad litem* of an infant defendant. — *Fraser v. Thompson*, 659.

See COMPANY, 4.

PRE-EMPTION. See WILL, 7.

PRESUMPTION. See MINES. SHORE.

PRINCIPAL AND SURETY. See FRAUD, 3.

PRIORITY. See MORTGAGE.

PRIVILEGE. See PRACTICE, 1. WITNESS.

PRODUCTION OF DOCUMENTS. See PRACTICE, 1, 4.

PROTECTING ORDER. See PRACTICE, 8.

PUBLIC COMPANY. See VENDOR AND PURCHASER.

RAILWAY COMPANY. See ULTRA VIRES.

"REAL SECURITY." See INVESTMENT.

RECEIVER.

By a receivership deed executed contemporaneously with a mortgage in fee, which it recited, the mortgagor and mortgagee appointed a receiver, and constituted him their agent and attorney to receive the rents of the mortgaged property, and to use such remedies by way of entry and distress as should be requisite for that purpose. By the same deed the mortgagor attorned as tenant from year to year to the receiver, and there was a proviso, that if default should be made

in payment of the mortgage-money, or interest, at the times appointed, the mortgagee might enter and avoid the tenancy created by the attornment. There was also a proviso, that nothing therein contained should lessen the rights, powers, or remedies of the mortgagee under the mortgage. On the mortgagor being found bankrupt: *held*, that the relation of landlord and tenant had been created between the receiver and mortgagor by the receivership deed, and that the receiver was entitled to distrain and take the goods which had belonged to the mortgagor on the mortgaged premises. — *Jolly v. Arbuthnot*, 224.

RECITAL. See VENDOR AND PURCHASER.

* 686 * RECTIFICATION.

For the purpose of reforming an instrument, clear and unambiguous evidence must be produced, not merely showing a mistake, but showing the deed in its proposed state to be in conformity with the intention of all the parties at the very time of its execution, and a denial by one of the parties that the deed as it stands was not according to his intention at the time, ought to have considerable weight.

A deed of compromise between a mother and son recited a letter of the mother's (who was a widow), written before the son's marriage, stating that by her will her residuary estate would be divided equally between her four sons. The deed also recited that the mother was seised, or had power to dispose of, real estate, the particulars whereof were specified in a schedule to the deed. It further recited disputes as to the effect of the antenuptial letter, and that to end them the arrangement was entered into effected by the deed. By the witnessing part, the mother covenanted that her executors would at her death pay to the son such a sum as should be found to be the amount to which he would have been entitled if her real and personal estate had consisted of the particulars specified in the schedule, and she had died without altering her will as it stood when the letter was written. The descriptions in the schedule comprehended not only property of which she could dispose, but other property of which she was tenant for life only, and which was intermixed with the former, and this was noticed in the schedule. *Held*:

1. That there was not sufficient controlling context to restrict the covenant to the value of her own property.
2. That without conclusive evidence of an intention on the part of both parties at the execution of the deed to enter into some other contract, it could not be reformed.
3. That until the amount to be paid was ascertained, there was no debt carrying interest. — *Fowler v. Fowler*, 250.

REPRESENTATION. See LEASE.

REMOTENESS. See WILL, 2.

SALE. See MORTGAGE.

SEPARATION DEED. See HUSBAND AND WIFE.

SERVICE (OUT OF THE JURISDICTION). See PRACTICE, 5.

SHAREHOLDER. See COMPANY, 6.

* 687 * SHARES. See COMPANY, 1, 6. DEED. VENDOR AND PURCHASER.

SHIP. See CHARTER-PARTY.

SHORE.

An information for the purpose of having the title of the Crown to alluvium gained from the sea declared and established is analogous to a bill to ascertain boundaries, and requires in support of it admissions or evidence showing a title in the Crown to some lands in the possession of the defendant.

But where the witnesses in support of the information deposed that the alluvium had been added to the main land, not gradually and imperceptibly, but rapidly: *held*, that a sufficient case had been made for directing issues.

Turning of cattle upon alluvium by the proprietor of land not separated from it by any boundary, although without interruption, held not an assertion of right so acquiesced in as to raise a presumption of title.

Semble, that the title to alluvium arising from artificial causes does not differ as to the rights of land-owners from the title to alluvium arising from natural causes, where the artificial causes arise from a fair use of the land adjoining the sea-shore, and not from acts done with a view to the acquisition of the sea-shore. — *Attorney-General v. Chambers*; *Attorney-General v. Rees*, 55.

SOLICITOR.

The Court will not, in the exercise of its summary jurisdiction over solicitors, call upon a solicitor to account for moneys received by him, where they were received by him not in the character of solicitor to the person making the application, but of solicitor to another person.

D. was solicitor to the plaintiff in a cause, and also to the receiver, and the receiver was in the habit of remitting the rents to him. *Held*, that D. must be considered to have received the rents as solicitor or agent of the receiver, and that the plaintiff could not call upon him to account for them under the summary jurisdiction.

Assuming the Court to have jurisdiction to make a solicitor answerable for losses occasioned to his client by mere ignorance, mistake, neglect, or mismanagement, apart from fraud or malfeasance, the Court has a discretion as to exercising or declining to exercise that jurisdiction, according to the circumstances of each particular case.

Per the Lord Justice TURNER. *Semble*, the Court has such a jurisdiction. — *Dixon v. Wilkinson*, 508.

SOLICITOR AND CLIENT. See FRAUD, 1, 2.

*SOLICITOR TO SUITORS' FUND. See PRACTICE, 11.

* 688

STATUTES.

7 & 8 Vict. c. 110 (Joint-stock Companies Act). See COMPANY, 3.

Statute of Frauds. See FRAUDS (STATUTE OF).

1 & 2 Vict. c. 110 (Judgments). See INTEREST, 2.

Limitations. See LIMITATIONS (STATUTE OF).

Succession Duty Act. See SUCCESSION DUTY.

13 Eliz. c. 5. See VOLUNTARY DEED, 2, 3.

SUBSTITUTION. See WILL, 6.

SUCCESSION DUTY.

The 4th section of the Succession Duty Act does not restrict the operation

of the duty as regards appointments to cases where the powers are created by wills taking effect, or by settlements made, after the commencement of the Act.

Personal property appointed under a general power, and not coming within the 4th section of the Act, ought not to be treated as the property of the donee, so as to be, in the case of the donee being domiciled abroad, exempt from succession duty.

The Act applies to a succession under a British settlement to British property vested in British trustees, and falling under the jurisdiction of a British Court, although the persons entitled are aliens domiciled abroad. — *Re Lovelace's Settlement*, 340.

SUITORS' FUND. See PRACTICE, 11.

SUMMARY JURISDICTION. See SOLICITOR.

SUPERSEDEAS. See LUNACY.

SUPPLEMENTAL ORDER. See PRACTICE, 8.

SURETY. See FRAUD, 8.

TRAFFIC. See ULTRA VIRES.

TRANSFER IN BLANK. See DEED.

TRANSFER OF MORTGAGE. See MORTGAGE.

TRUSTEES. See INVESTMENT. NEW TRUSTEES.

ULTRA VIRES.

* 689 The Brighton Company and the South-Western Company became jointly entitled to a line of railway, under *an Act of Parliament made in 1847, by which this joint line was placed under the management of a joint committee. By this Act it was provided that each of the two companies might use the joint line for all purposes necessary for the traffic of the same respective company. The South-Western Company afterwards, without Parliamentary authority, entered into agreements with the Portsmouth Company, by which the South-Western Company was to have the exclusive use of the line of the Portsmouth Company, paying 18,000*l.* a year.

Held, that the Act of 1847 did not create a joint tenancy carrying with it the right of using for every kind of traffic a station appurtenant to the joint line, and that the South-Western Company had no right to use it except for what was properly traffic of that company.

Held, also, that the agreements between the South-Western Company and the Portsmouth Company were *ultra vires* and illegal, and that the conveyance of passengers and goods under them did not constitute traffic which could be considered traffic of the South-Western Company within the meaning of the Act of 1847.

Held, therefore, that the Brighton Company were entitled to an injunction, restraining the South-Western Company from using the joint station for the purposes of any traffic destined for or coming from the Portsmouth Railway or any part thereof. — *London, Brighton, and South Coast Railway Company v. London and South Western Railway Company*, 362.

UNCERTAINTY. See WILL, 2.

VACATING ENROLMENT. See PRACTICE, 9.

VALUE (ASSIGNMENT FOR). See VOLUNTARY DEED, 1.

VENDOR AND PURCHASER.

An arrangement having been made between the managing directors of a bank and S., that the managing director should procure the transfer of 4,000 shares to S. or his nominees, the shares to be paid for by S., W., one of the shareholders who had acceded to this agreement, transferred his shares to K., a nominee of S., by a deed in the common form, reciting a contract for sale by W. to K., and acknowledging the purchase-money to have been paid. K. took this transfer at the request of and as a trustee for S., and on the faith of the acknowledgment in the deed and the assurance of S. that the purchase-money had been paid. The money was never in fact paid. *Held*, that W. was entitled to recover it from K. by suit in equity. — *Wilson v. Keating*, 588.

* VESTED INTEREST. See WILL, 8.

* 690

VICAR. See MINES.

VIVA VOCE EXAMINATION. See PRACTICE, 10.

VOLUNTARY DEED.

1. The assignee for value of an equitable interest in the money payable under a voluntary bond, *held* entitled to rank as a specialty creditor for value against the assets of the obligor. — *Payne v. Mortimer*, 447.
2. The mother of a man in embarrassed circumstances agreed to advance him 190*l.*, upon condition that he should give her a mortgage upon a small estate to which he was entitled for that sum and some moneys, amounting to 210*l.*, which she had spent in paying off some prior incumbrances, and should settle the equity of redemption upon himself and his children. This transaction was completed by two deeds, by one of which the settlor mortgaged the estate to his mother to secure 400*l.*, and by the other, in consideration of natural love and affection, settled the estate on himself and children, neither deed containing any reference to a bargain between the mother and son for the settlement. The mortgaged property was an ample security for the 400*l.* The Court was satisfied on the evidence that the settlement was executed to induce the mother to make the advance, and that she would not have made it unless the son had agreed to make the settlement. *Held*, that the settlement was to be treated as made *bonâ fide* for value, and not void as against creditors under 13 Eliz. c. 5.

It was doubtful upon the evidence whether the mother had really advanced so much as 210*l.* in paying off prior incumbrances. *Held*, that the transaction appearing to be *bonâ fide*, the question how much was due on the mortgage did not affect the validity of the settlement.

The practice of framing deeds so as not to show the real nature of the transaction carried out by them is to be discouraged. — *Thompson v. Webster*, 600.

8. A bill was filed by a creditor, to whom an uncertificated bankrupt became indebted after his bankruptcy, on behalf of himself and all creditors subsequent to the bankruptcy, seeking to set aside a volun-

tary deed made before the debt due to the plaintiff was incurred. The assignees, who were defendants, did not dispute the settlement: *Held*, that the bill could not be sustained. — *Collins v. Burton*, 612.

VOLUNTARY TRUST. See HUSBAND AND WIFE.

WILL.

- * 691 1. An absolute gift in clear language *in a will is not taken away unless by language equally clear. Where, therefore, a testator having made a provision in his will for his eldest grandson by a bequest of leasehold property, directed that his residuary real and personal estate should be equally divided between his four other grandchildren in common, and declared that the share of each should remain vested in the trustees of the will upon trust to permit him and her to receive the income for life, and after the decease of each, his or her share to be in trust for his or her children: provided, that if the share of any one or more of the four grandchildren should not vest in any children or child of his or her body, or in case the term in the leasehold given to the eldest grandson should expire in his lifetime, then and in either of such cases the eldest grandson should be let into and take an equal share in the residuary estate intended for the other four grandchildren and their issue equally with such other grandchildren or their respective issue. *Held*, that on the death of one of the four younger grandchildren without issue, the residue remained divided into four, and was not redistributable into five parts. — *Kiver v. Oldfield*, 30.

A testator directed his trustees to invest his residuary estate, and suffer the interest to accumulate until the principal, together with the accumulation of interest, should amount to "3000*l.* or thereabouts," and then to place out the same at interest, and pay the interest equally among certain specified legatees named in the will in equal shares during their lives and the life of the survivor; and in case any of them shall happen to die leaving lawful issue, the issue were to be entitled to the same share in the interest to which their parents would, if living, have been entitled, and immediately after the decease of the survivor of the legatees specifically named, then, upon trust, to pay the "3000*l.* or thereabouts" equally among the lawful issue of the specified legatees to whom the testator gave and bequeathed the same, but in case any of them should happen to be then dead leaving lawful issue, such issue were to be entitled to the share to which the parent or parents of such issue would, if living, have been entitled.

Held, that the gift of the "3000*l.* or thereabouts" was not void for uncertainty or remoteness, but that the disposition of the income accruing between the expiration of the period allowed by the Thellusson Act and the end of the time required to accumulate the 3000*l.* was invalid, and that the income for that period was undisposed of, and belonged to the next of kin. — *Oddie v. Brown*, 179.

3. A direction in a will that two of the testator's sons might have the use and occupation of part of the devised lands, paying a rent and

* some outgoings, but that in default of payment, or if they converted the marsh land into tillage, they should no longer have possession. *Held*, not to require personal use and occupation, but to permit the sons to let the land. * 692

- A testator gave real and personal estate to trustees in trust to pay the income of a fifth part to a daughter for life, and after her death to all her children equally, with similar trusts in favour of the testator's four other children and their children, with a proviso, that if any of the testator's said children should die without leaving any child living at his death, the part of such child should be held in trust for all the testator's other children for their lives and the issue of any of them that should be dead, as before directed; and when all his children should have died, then the whole property was to be in trust for all the children of the testator's children *per capita*. *Held*, that the income of the share of a child dying and leaving a child, who also died before the death of the testator's last surviving child, was undisposed of between the two last-mentioned deaths, and that the case was not one in which cross-remainders were implied. — *Rabbeth v. Squire*, 406.
4. A testator gave legacies to "my niece Elizabeth S." When he made his will he had a great-great niece named Elizabeth Jane S. who was known to him. and there was not then any other person at all answering the description. He formerly had had a niece with whom he was intimate, and to whom he had by a former will made precisely the same bequests as those in question; but when he made his last will he knew that she had been dead some time. *Held*, that Elizabeth Jane S. was entitled to the legacies. — *Stringer v. Gardiner*, 468.
5. Stock was bequeathed in trust for the testator's brother and the brother's wife for their lives successively, and after their decease in trust to be divided equally amongst the testator's nephews and nieces, children of the brother, then living, or their legal personal representatives. *Held*, that the representatives of nephews and nieces dying in the lifetime of the surviving tenant for life took shares, and that such representatives were the next of kin, and not the executors or administrators of the nephews and nieces. — *King v. Cleaveland*, 477.
6. A testator gave to each of his brothers and sisters named in his will "or to their legal representatives" 500*l.*, to be paid them in two years after his death. He then gave legacies to several nephews and nieces by name. The whole amount of the above legacies was 6100*l.* He gave the residue to his wife, "except 4100*l.*, of which she is only to have the use during her natural life, and which I wish to be divided amongst my relations, * to whom I have left legacies in the fore part of this instrument, in proportion to the legacies left above, which will just make their legacies double the first bequest." On inspecting the original will, which was a holograph, 4100*l.* seemed to have been substituted for 6100*l.* * 693
- Held*, that the intention to double the original legacies was not sufficiently clear to justify the Court in holding that 4100*l.* was written by mistake for 6100*l.*

Held, also, that the words “ or to their legal representatives,” did not amount to a substitutionary gift of the share of a sister who died in the testator’s lifetime in the 4100*l.*

Held, also, that the 4100*l.* was not so taken out of the residue as to prevent the shares of it which lapsed from going to the residuary legatee. — *Thompson v. Whitelock*, 490.

7. Land was devised in trust for the testator’s widow for life, and after her death for sale and division of the proceeds among his children equally, with a direction that the trustees should offer the land to the testator’s son, at a specified price, upon the death of the widow. The land was purchased by a railway company, under the powers given by their Act, for more than the specified sum. *Held*, that the son was entitled to the difference. — *Re Cant’s Estate*, 503.

8. A fund was bequeathed to the testator’s daughter for life, and if she should leave any child or children, to be divided among such children, whose interests were to be vested at twenty-one, with a direction to apply the interest of the fund towards the maintenance of the daughter’s children, and a power for the trustees, with the daughter’s consent, during her life, to make advancements to her children not exceeding their respective presumptive shares, with a gift over if no child attained twenty-one. *Held*, that a child who attained twenty-one, and died in the daughter’s lifetime, took no share. — *Sheffield v. Kennett*, 593.

WILL (ESTABLISHING). See COSTS, 1.

WINDING-UP. See COMPANY, 5.

WITNESS.

Whatever the rule may be as to the right of a witness to decline answering a question, on the ground that it may tend to criminate him, without giving any reason why it should tend to do so, he will be compelled to answer, where he gives his reason, and such reason is insufficient. — *Re Mexican and South American Company. Aston’s Case*, 320.

See PRACTICE, 10.

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THE END.



